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Cicero on Politics and the Limits of Reason

The Republic and Laws

JED W. ATKINS

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Cicero on Politics and the Limits of Reason

A prolific philosopher who also held Rome's highest political office, Cicero was uniquely qualified to write on political philosophy. In this book Professor Atkins provides a fresh interpretation of Cicero's central political dialogues – the *Republic* and *Laws*. Devoting careful attention to form as well as philosophy, Atkins argues that these dialogues together probe the limits of reason in political affairs and explore the resources available to the statesman given these limitations. He shows how Cicero appropriated and transformed Plato's thought to forge original and important works of political philosophy. The book demonstrates that Cicero's *Republic* and *Laws* are critical for understanding the history of the concepts of rights, the mixed constitution, and natural law. It concludes by comparing Cicero's thought to the modern conservative tradition and argues that Cicero provides a perspective on utopia frequently absent from current philosophical treatments.

JED W. ATKINS is Assistant Professor of Classical Studies at Duke University. His research focuses mainly on Greek and Roman political thought and ethics. In addition he works on the modern reception of ancient philosophy and the relationship between Greco-Roman philosophy and early Christian ethics.

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CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

www.cambridge.org

Information on this title: www.cambridge.org/9781107043589

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First published 2013

Printed in the United Kingdom by Clays, St Ives plc

A catalogue record for this publication is available from the British Library

Library of Congress Cataloguing in Publication data

Atkins, Jed W.

Cicero on politics and the limits of reason : the republic and laws / Jed W. Atkins.

pages cm – (Cambridge classical studies)

Includes bibliographical references and index.

ISBN 978-1-107-04358-9 (hardback)

1. Cicero, Marcus Tullius – Political and social views.
2. Political science – Rome – History. I. Title.

JC81.C7A75 2013

320.1–dc23

2013012187

ISBN 978-1-107-04358-9 hardback

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For Claire and William

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ACKNOWLEDGMENTS

This book emerged from a University of Cambridge doctoral dissertation that was submitted and defended in 2009. Malcolm Schofield directed the dissertation and, prior to that, served as my primary mentor for the Cambridge MPhil program in Political Thought and Intellectual History. From his example and instruction alike, I have learned much about doing research in Greek and Roman political thought, and I am grateful for his support during my time at Cambridge and beyond. Another longstanding debt is owed to Paul Franco and Jean Yarbrough, who introduced me to the history of moral and political philosophy at Bowdoin College. Paul gave me a copy of the Oxford World's Classics edition of Cicero's *Republic* and *Laws* late in my undergraduate career; Jean later suggested that I write my dissertation on Cicero. The original dissertation was examined by Christopher Gill and Peter Garnsey, whose incisive comments proved most helpful when I began to transform the thesis into a book.

During the past four years, I have been fortunate to be employed as an Assistant Professor in the Classical Studies Department at Duke University. I am thankful for the support and encouragement of my colleagues as well as the administrative staff. I owe a particular debt of gratitude to Diskin Clay, who not only read most of the penultimate draft of the manuscript, but has also been a most generous and supportive mentor and friend.

I have benefited from the comments of a number of readers on earlier drafts of portions of the manuscript. They include Jack Barlow, Keegan Callanan, Diskin Clay, Peter Euben, Paul Franco, Benjamin Keim, Joel Schlosser, and Quentin Skinner. I should also like to thank the Program in Constitutionalism and Democracy, and in particular Jim Ceaser, who twice hosted me at the University of Virginia, where I presented drafts of [Chapters 3](#) and [4](#). I am grateful for the feedback I received on these occasions.

ACKNOWLEDGMENTS

David Sedley and Mary Beard read the entire manuscript as editors for the CCS series and provided helpful feedback and corrections. At Cambridge University Press, Michael Sharp and Elizabeth Hanlon provided timely advice and support as the book made its way to press. Annie Jackson handled the copy-editing, and Kate Mertes compiled the indexes. Jenny Slater guided me through the production process.

Writing a book is at times a lonely venture, and one that has made me all the more aware of my dependence on the support of friends and family. The friendships of Keegan Callanan and Benjamin Keim in particular have helped encourage and sustain me throughout the process of writing this book; the selfless love of my parents, Bill and Mary Atkins, has done so from my earliest days. For their unwavering support, and for that of my sisters, Carrie and Hannah, I am most grateful. Most of all, however, I thank my wife Claire and son William, who fill each day with joy. It is to them that I dedicate this book.

TEXTS, TRANSLATIONS, AND ABBREVIATIONS

For the Latin text of Cicero's *Republic* and *Laws* I have used the following edition: *M. Tulli Ciceronis. De re publica, De legibus, Cato Maior de senectute, Laelius de amicitia*, ed. J. G. F. Powell, Oxford Classical Texts (Oxford, 2006). The editor has reordered the fragments of Books 3, 5, and 6 of the *Republic*. When referring to these passages, I have included the standard reference to Ziegler's Teubner edition after the reference printed in the OCT (e.g., 6.22 = 6.18). For other ancient works, I have generally followed the texts printed in the Oxford Classical Texts series and, for works not available in that series, the Teubner series. Exceptions are listed in the abbreviations provided below or in the first section of the bibliography.

Translations are my own unless otherwise indicated. In working on Cicero's *De re publica* and *De legibus*, I have consulted the recent translations by Niall Rudd in the Oxford World's Classics series and James E. G. Zetzel in the Cambridge Texts in the History of Political Thought series. I have also somewhat less frequently looked at the older translations by Clinton Walker Keyes (in the Loeb series) and by George Sabine and Stanley Smith (*Republic* only). Zetzel's excellent edition in particular has seen much use (both within the classroom and without) during the writing of this book: I have benefited greatly from both his translations and notes. In order to make this book accessible to as wide an audience as possible while limiting its length, I generally have not supplied complete Greek and Latin texts for primary passages quoted in English. I have, however, frequently included relevant Greek and Latin words along with my own translations. When doing so, I have typically quoted the Greek and Latin as they appear in the texts; e.g., nouns are generally cited in oblique cases. Conversely, when citing Greek and Latin words within my own discussion, I usually refer to them by their dictionary form.

Abbreviated references to classical works follow the abbreviations used in the *Oxford Classical Dictionary* (3rd edn.). Please note the following abbreviations for Plato's major political works: *Statesman* (*Politicus*) *Plt.*; *Republic* (*Respublica*) *Resp.*; *Laws* (*Leges*) *Leg.* In the notes, I have generally included abbreviated references to the author's name along with the title to avoid any possible ambiguity between Plato's *Republic* and *Laws* and Cicero's, e.g., *Pl. Leg.* and *Cic. Leg.* Journal titles are abbreviated in the Bibliography according to the conventions of *L'année philologique*. Please note the following additions and exceptions:

- ANRW* *Aufstieg und Niedergang der römischen Welt*, ed. H. Temporini. Berlin, 1972–.
- DL* Diogenes Laertius: *Lives of Eminent Philosophers* = *Diogenis Laertii Vitae Philosophorum*, ed. H. S. Long (2 vols.). Oxford Classical Texts. Oxford, 1964.
- LS* *The Hellenistic Philosophers*, eds. A. A. Long and D. N. Sedley (2 vols.). Cambridge, 1987.
- OLD* *Oxford Latin Dictionary*, ed. P. G. W. Glare. Oxford, 1968.
- SVF* *Stoicorum Veterum Fragmenta*, ed. H. von Arnim (3 vols.). Leipzig, 1903–5.

INTRODUCTION

On the fragments of Cicero's book *Of the Republic*, I said: "We owe many of these fragments to Nonius, who, in giving us the words, has preserved the things." I am naturally curious about all fragments from the works of ancient authors, just as one likes to find the debris from shipwrecks that the sea has left on the beach. Cicero, in my view, is one of the great minds that has ever existed: a soul always beautiful when it was not weak.

Montesquieu¹

The loss of his [Cicero's] book upon republics is much to be regretted ... As all the ages of the world have not produced a greater statesman and philosopher united in the same character, his authority should have great weight.

John Adams²

The Romans have their Cicero, who alone is perhaps worth all the philosophers of Greece.

Voltaire³

Books dealing with Cicero's philosophical dialogues customarily begin with a rehearsal of the copious evidence for his longstanding exile from the company of first-rate philosophers and a defense of why Cicero is worthy of study. I have chosen to begin mine with high praise. The fact that I have had to go back to the eighteenth century to find it should sufficiently testify to Cicero's fortunes in recent centuries. As for the defense, it will be found in the pages to follow, which examine Cicero's two central dialogues on the topic of political philosophy – the *Republic* (*De republica*) and *Laws* (*De legibus*). I argue that these dialogues together probe

¹ Montesquieu, *My Thoughts*, *Pensée* 733 (trans. Clark).

² Adams, *A Defence of the Constitutions of Government of the United States of America*, I:xiix–xx, xxi.

³ Voltaire, *Dictionnaire philosophique, portatif*, 304.

the limits of reason in political affairs and explore the resources available to the statesman given these limitations. In pursuing this line of enquiry, Cicero deftly appropriates, transforms, and, at times, transcends Greek philosophy. As a result, these dialogues represent a substantial contribution to ancient political philosophy with important implications for our understanding of the history of political thought. Indeed, on more than one occasion their contents challenge the dominant historical paradigm regarding the origin or early development of a key concept in political thought. One of the goals of this book is to show where and how they do so.

Perhaps no other combination of texts offers to the modern student of classical political thought more promise of both great reward and frustration than Cicero's *Republic* and *Laws*. A glance at the basic topics treated in these works reveals something of their potential to repay careful study. Natural law; the mixed constitution; regime change; the qualities and characteristics of good statesmen; justice, liberty, and equality within a good and stable political order; and an account of political society that brings to the fore questions of citizens' rights and legitimate rule – all bear on matters of considerable debate and lasting importance in the history of political thought. What is more, the discussion of one of these concepts – natural law – represents the most detailed treatment of the topic surviving from antiquity. And Cicero's treatment of the mixed constitution represents the only theoretical account by a Roman of a concept widely regarded as one of the ancient world's most important contributions to political thought.

Intriguing further still are the unique qualifications of the author of these dialogues to write on their subject matter. Unlike almost all other influential political philosophers – Plato and Aristotle included – Cicero achieved distinction as a politician. Not only does he stand beside Varro, Seneca, and St. Augustine as Rome's most prolific philosophers, but he also ranks among Caesar, Pompey, and the Emperor Augustus as one of her best-known politicians. No ivory-tower intellectual, he held the highest political office in a large republic confronted with a complex range of administrative challenges arising from its expanding empire. If there is some truth to Aristotle's view that political knowledge is acquired by experience, then Cicero may still appear, as John

Adams supposed, to be a rather promising guide for understanding political affairs.

Yet Cicero's *Republic* and *Laws* also challenge and frustrate readers. Much of the trouble involves their coherence. The source of the first and most obvious difficulty is the condition of the surviving manuscripts: neither dialogue has survived intact. Modern readers have access to far more of *De republica* than such eighteenth-century readers as Montesquieu and Adams, thanks to Angelo Mai's discovery and publication of a palimpsest in 1819 and 1822, respectively; still, this only accounts for roughly a third of the original work.⁴ As for *De legibus*, while a reference by Macrobius indicates that Cicero had written at least five books, not even three full books survive.⁵ It is likely, then, that between the two works, more of the text has been lost than survives.

But problems of coherence are raised by what survives as well as by what is lost. Both dialogues puzzle readers with the apparent lack of unity underlying their various components. Most of what survives from the first three books of the *Republic*, which in fact represents most of what remains of the dialogue, seems unrelated to the work's conclusion. Whereas most of the work appears to defend a life devoted to politics and to uphold Roman ideology, the dialogue concludes with a vision of the cosmos that, if anything, seems to challenge what the earlier books affirmed. In the *Laws* the situation is virtually reversed: the first book presents a series of philosophical arguments for a standard for law that the Roman laws discussed in the remaining two books do not appear to be able to meet.

Finally, there is the matter of coherence between the two works. *De legibus* repeatedly refers back to *De republica* and presents itself as the complement to the project begun in the earlier dialogue. The participants in the conversation depicted in Cicero's *Laws* prove to be aware of particular arguments in his *Republic*; and in fact, the later dialogue presupposes some of its predecessor's conclusions. Just as Cicero took Plato's *Laws* to complement and complete his *Republic*, so *De legibus* is to provide laws for the

⁴ For a discussion of the text with bibliography, see Zetzel (1995) 33–4.

⁵ See Macrobius *Sat.* 6.4.8.

best regime identified in *De republica*.⁶ Although there is occasional dissent,⁷ most scholars seem to agree that Cicero intended the two works to be complementary; the current orthodoxy holding that they were composed around the same time only strengthens this view.⁸

If these dialogues are related, what then unites them? What line of argument begun in the *Republic* does the *Laws* sustain, complement, and complete? The key to answering this question lies in a careful reconsideration of precisely those literary features of the dialogues that are most puzzling. Scholars usually attribute the perplexing characteristics of these works to Cicero's failure as a philosopher and writer. Instead, I argue that such puzzling features as the other-worldly Dream of Scipio in the *Republic* and the obscure relationship between natural law and the ideal law code in the *Laws* help illuminate the limits of reason in political affairs and in turn point the way to the dialogues' central concern. In these works, Cicero explores the possible grounds for a good and lasting political society given the limitations placed on perfectly just and rational rule by chance, necessity, historical contingency, and human nature. This is the thread that both unifies the different parts of each dialogue and cements together these works into a single philosophical project. When the dialogues are read in light of this important unifying concern, much of their supposed literary and philosophical incoherence dissolves.

Talk of reason and its limits requires some explanation. When we think of reason, we usually think of the *ability* to reason, that is, the formal ability to draw inferences or make deductions given a set of data. Reason is neutral insofar as it entails no substantive positions or values. It is the instrument by which we determine what to conclude given certain assumptions or what to choose given certain preferences, but reason itself is silent about the validity of these assumptions or preferences. In contrast to this

⁶ Cicero's complementarian reading of Plato's *Republic* and *Laws* is complex. I touch on the matter briefly at points in [Chapters 2](#) and [3](#). For a more direct and extended treatment of this question, see J. W. Atkins (2013).

⁷ See Zetzel (1995) 28.

⁸ For questions of dating, see Schmidt (1969) along with the discussion of the matter in Rawson (1973).

common modern conception of reason, Plato, Aristotle, and the Stoics held that reason is substantive and prescriptive.⁹ Reason prescribes what is good, how we should live, and how we should treat one another as social animals. To follow the rule and guidance of reason means that one must commit oneself to embracing certain goods and following a particular way of life. This notion of reason has important consequences for politics: the possession of reason unites human beings in political society and prescribes the form that this society should assume. It is this substantive and prescriptive notion of reason and its political implications that Cicero is especially concerned with in these dialogues.

On Cicero's account, reason in its pure form is divine; it regulates the forces of nature and the patterns of the cosmos, along with the lives of human beings. However, human beings characteristically respond to the promptings of both reason and a complex array of passions and desires. As a result, they follow nature's directives imperfectly. Somewhat paradoxically, human nature, understood as the characteristics and qualities common to human beings, differs from the perfectly rational nature of the cosmos of which human beings are a constitutive part. This insight into human nature is essential for understanding political affairs, the realm in which human beings act, and political history, the record of these actions. Roman history shows that political affairs do not proceed rationally but are subject to chance, necessity, and contingency. Reason makes claims on human beings that they cannot strictly meet; it prescribes a rule whose realization is doubtful. This is an important concern for politics and it is the central problem of these dialogues.

It may be helpful to situate briefly Cicero's philosophical undertaking more broadly within the context of – first – the history of political thought and – second – intellectual developments in late Republican Rome. The *Republic* and *Laws* are shaped by attention to the following two sets of contrary concepts: the rational, natural, divine, eternal, and ideally best on one hand, and the human, customary, contingent, historical, particular, and practicable on the other. How do these different concepts relate to one

⁹ See M. Frede (1996).

another? One possible stance – and one that is relatively common in the history of political thought – would be to emphasize one of these sets to the exclusion of the other. For example, the utopian cities of Plato’s and Zeno’s *Republics* (as they are commonly construed)¹⁰ exclude the second set, while the republicanism of the Roman historians Sallust, Livy, and Tacitus excludes the first.¹¹ And in contemporary political philosophy, ideal theorists of various stripes focus on just and rational ideals rather than feasible societies, while their realist critics dismiss this “utopianism” as misguided.¹²

However, it is also possible to collapse the two sets. The result: a proto-Hegelianism that identifies the rational with that which has been actualized in history. Scholars have sometimes supposed that Cicero himself endorses such a position by positing that reason finds its most complete expression in traditional Roman institutions and laws.¹³ It is certainly possible that this proto-Hegelian line held some appeal for the conservative Cicero. Nevertheless, if it was a temptation, it was one that he resisted. As these dialogues progress, he invites the reader to evaluate critically the proto-Hegelian position along with utopianism and a version of nonperfectionistic republicanism that purports to have no concern for ideals. Cicero’s project, though, is not completely aporetic or negative. He shows how history and tradition are able to play both conservative and critical roles while also suggesting why the statesman may find these resources inadequate apart from a philosophical grasp of reason and nature. Thus, he ultimately tries to work out a way to bring the natural, ideal, and rational to bear on the customary, contingent, and practicable without completely collapsing these different categories.

Cicero’s philosophical project as represented in these dialogues may also be placed within the context of the intellectual revolution that accompanied the political upheavals during the final decades

¹⁰ Both *Republics* have also been read as *anti*-utopian works. See Bloom (1968) for Plato and Schofield (1999a) 51–68 for Zeno.

¹¹ For the republicanism of the Roman historians, see now Kapust (2011).

¹² For two recent works criticizing ideal theory and utopianism, see Geuss (2008) and Sen (2009). For a recent defense of utopianism, see Estlund (2008) 258–75. For an overview of the debate between realists and ideal theorists, see Galston (2010).

¹³ See Finley (1983) 128; Girardet (1983); and Moatti (1988) esp. 429.

of the Roman Republic. At a time when traditional sources of authority were weakening, Roman intellectuals creatively and dynamically employed critical reasoning through such scientific forms of organizing and disseminating knowledge as rhetoric, grammar, medicine, architecture, law, historiography, geography, ethnography, theology, and philosophy.¹⁴ Through the proliferation of these sciences, the Romans forged a rational, logical, and unified order from chaos and disunity – an achievement that, according to Claudia Moatti, marked an “age of reason.”¹⁵ In particular, the potential universal extension of the legal concept of Roman citizenship imposed a general, universalizable rational order on the many different histories and traditions of the peoples within Rome’s expanding empire. Moatti correctly situates Cicero’s *Laws* – to which I would also add the *Republic* – within this wider intellectual movement to impose order on disorder and to reconcile (universal) reason with (particular) history.¹⁶ However, these dialogues do not simply extend a Roman rationalizing tendency to the realm of political affairs; they also reveal the difficulties attendant upon any such attempt to reconcile history and reason. Far from a straightforward instance of the marshaling of rational and historical enquiry to stabilize Rome’s deteriorating political condition, Cicero’s *Republic* and *Laws* represent a more nuanced and circumspect approach to the project, illuminating its limitations as well as its possibilities.

After decades of focusing largely on his Greek sources, scholarship on Cicero’s philosophical works has begun to pay attention to the Roman’s own philosophical views and use of Roman political and legal concepts.¹⁷ This study may be seen as a contribution to this more recent approach to Cicero’s philosophical works, but with a couple of important caveats.

First, Cicero consciously places himself within a tradition of doing political philosophy that he traces to Plato, and it is impossible to understand the philosophy of *De republica* and *De legibus*

¹⁴ See Rawson (1985) and Moatti (1997). ¹⁵ Moatti (1997) 54.

¹⁶ See Moatti (1997) 293–8, 313.

¹⁷ See e.g., N. Wood (1988); E. M. Atkins (1990); Griffin and Atkins (1991); A. A. Long (1995); the papers in Powell (1995); and Harries (2006).

without also appreciating the Roman's careful appropriation of parts of this tradition (see especially [Chapter 5](#)). In particular, this book takes seriously Cicero's invitation to read his dialogues in light of Plato's. Far from using Plato's work merely as a "foil"¹⁸ or "literary model,"¹⁹ Cicero's own exploration of politics given the limits of reason is indebted above all to a careful reading of his predecessor's *Republic* and *Laws*. In Plato he finds a philosopher worthy of thinking with and, at times, against.

My reading of these dialogues, then, seeks to do justice to Cicero's engagement with Plato as well as his appropriation of Roman political and legal concepts, which has more recently been receiving increased attention. The argument of these dialogues demonstrates a critical and careful use of Greek sources, models, and antimodels. Impressively, Cicero is able to integrate Roman ideas smoothly into his analysis. At times he moves well beyond Plato or any other Greek thinker while remaining consistent with his general Platonic concern with the rule of reason and its limitations. Cicero's *Republic* and *Laws* are therefore products of the appropriation, transformation, and transcendence of Greek thought.

Second, we must exercise caution when determining Cicero's own philosophical views. Like their Platonic models, these two dialogues are carefully crafted pieces of literature. *De republica* took Cicero three years to complete – roughly the amount of time he spent composing the entire later cycle of a dozen or so works from 46 to 44 BC. And *De legibus* has been judged by one commentator to be "Cicero's most successful attempt at imitating the manner of a Platonic dialogue."²⁰ My study is shaped by the belief that, like Plato's dialogues, Cicero's *Republic* and *Laws* repay a close reading that gives careful attention to literary features. Form and philosophy are intimately connected.

Commitment to reading a work dialogically requires attention to the literary context in which an argument occurs.²¹ Admittedly

¹⁸ Zetzel (1995) 14. ¹⁹ Annas (1997) 152.

²⁰ Zetzel (1999) xxi.

²¹ I am here using "dialogical" to refer to a reading that takes seriously the fictional and dramatic nature of the genre of dialogue, and not in the technical sense associated with the work of Mikhail Bakhtin.

this can at times be difficult when reading a fragmentary text like the *Republic*. In particular, little remains of Books 4–6, which presumably focused on “the best citizen” or the best statesman.²² The analysis of the characteristics, qualities, and education of statesmen and citizens was a crucial element of Cicero’s political philosophy and most likely an important part of *De republica*. Had the entire text survived, the topic would probably have warranted far more attention than I have given it. As it is, I have placed little emphasis on the fragments of Books 4 and 5: given the importance of context for interpreting Cicero’s dialogues, to place much emphasis on fragments in which the overall structure is lost and the arguments are largely divested of their context could result in wildly misleading interpretations.²³ In addition, I have chosen not to fill in gaps in the text with material from other dialogues. This is partly due to misgivings about transferring views that Cicero expressed in very different contexts to *De republica*, a fictive literary production rather than any straightforward exposition of its author’s views. And partly it is because this book is an analysis of the philosophy of two of Cicero’s dialogues rather than a survey of his political thought.²⁴

So much for the general theme of the book and my basic approach to reading Cicero’s *Republic* and *Laws*. How does my argument unfold? Experience suggests that many readers will be relatively unfamiliar with these dialogues and unaccustomed to reading them dialogically. Therefore, [Chapter 1](#) explores the connection between dialogue form and philosophy. I show how Cicero skillfully employs this genre and manipulates his own authority as a writer to perform an action in his readers, namely, to provoke them to engage in a cooperative search for the principles of politics. The formal features of the *Republic* invite the reader to turn his or her attention to the substantive questions concerning the role of reason in politics. The focus of this chapter is mainly on *De republica*, which, for reasons that I will later make clear, presents somewhat more of a challenge to the reader than its companion.

²² See Cic. *Q. Fr.* 3.5.1. ²³ See Beard (1986) 36.

²⁴ For surveys of Cicero’s political thought, see N. Wood (1988); Perelli (1990); and Radford (2002).

Although attention to dialogue form is also important for reading *De legibus*, here I aim to persuade more by example than by argument.

Chapters 2–4 are concerned with Cicero’s *Republic*. Chapter 2 accepts Cicero’s invitation to search for the principles of political affairs in the dialogue. I explore several central concerns of the *Republic* that most clearly come into focus in light of the contrast between the philosophy of the dialogue’s first five books and its conclusion – the other-worldly Dream of Scipio. Given that for Cicero (as for Plato) reason prescribes a certain type of political rule, what are its defining characteristics and the conditions for its realization? Are these conditions likely to obtain? If not, why not? Cicero answers that although civic concord, harmony, and stability characterize the political society whose members are completely unified in their commitment and submission to reason’s rule, such a regime is not practicable, for it ignores the fundamental precept that political affairs encompass a degree of irrationality. The dialogue develops a science of politics based on a political psychology complemented by a cosmology. This political science simultaneously prescribes rational rule while questioning the possibility of its realization.

Given the limits of reason in politics and the limitations placed on the implementation of ideal rational rule, the dialogue focuses on the best practicable regime, which employs a mixture of democratic, monarchic, and aristocratic elements and principles. This mixed constitution is the subject of Chapter 3. Cicero’s account illuminates the competing foundational views about human nature, chance, and historical contingency that underlie the various theoretical articulations of the concept in Greek and Roman political thought. Cicero’s version of the mixed regime assumes that human nature is a complex and variegated force to be accommodated but never mastered or thoroughly understood. As a result, central to his analysis are contingency, unpredictability, hostility to conflict – and the importance of a virtuous leadership and citizenry.

Chapter 4 takes up Cicero’s formal definition and analysis of political society. While much of his argument thus far has revealed a debt to Plato, Cicero here draws on Roman law to develop an original account of citizens’ rights in which rights make claims on

rulers while binding together citizens in a shared enterprise. These citizens' rights are derived from a conception of what it means to be a citizen in a republic, which in turn is anchored in Roman history. Consonant with his stress on the limits of rational rule, Cicero endeavors to delineate the limits of what those who govern may legitimately do in pursuit of what they take to be the good. His conception of rights avoids the individualism of modern liberal thought and coexists with a substantive vision of the good society.

Cicero's account to this point raises a question: if reason's prescriptions for a good society are authoritative, how can one justify the laws, customs, and institutions of a regime that deviates from reason's standards – as the best practicable regime in the *Republic* must? While Cicero's *Republic* brings this matter to the reader's attention, it does not provide a satisfactory solution. For this, we must turn to Cicero's *Laws*, which inherits this fundamental problem from its predecessor. In [Chapter 5](#), I explicate Cicero's treatment of natural law in Book 1 of the *Laws*. Cicero's complex attempt to derive natural right from human rationality ultimately lays bare the limitations that the legislator's commitment to the needs of the city places upon philosophical enquiry.

In [Chapter 6](#) I show how natural law relates to the laws of the law code developed in Books 2 and 3 of the *Laws*. I argue that in his *Laws* Cicero is largely successful in working out how reason and nature may “preserve and protect” that which necessarily encompasses the conventional, practicable, contingent, and irrational. Cicero uses categories from Roman law to develop further basic Platonic insights into the relationship between nature and custom. The result is the most developed and attractive account of the relationship between natural law and positive or conventional law prior to Thomas Aquinas.

This book challenges the prevalent view that these dialogues are blueprints for political reform rather than contributions to political philosophy.²⁵ This is not to suggest that Cicero believed that the

²⁵ See e.g., Girardet (1983) and Blössner (2001). Girardet's views in particular have greatly influenced Anglo-American scholarship on *De republica* and *De legibus*. Scholars have long taken Cicero to task for failing to adequately remedy the immediate political problems of his day (see e.g., W. W. Howe (1930); Rawson (1973); and Finley (1983) 128). In response to such views, recent commentaries on both Cicero's *Republic* and *Laws*

issues treated in these dialogues were of an impersonal nature with no relevance for the political circumstances of his day. Indeed, it is not hard to imagine that questions about the possibility of rational rule, its limits, and the parameters within which rulers may rightfully govern given these limitations would have seemed to be pressing matters during a time filled with political and personal uncertainty. After all, Cicero began work on the *Republic* soon after an uneasy alliance between Caesar, Crassus, and Pompey had relegated him to the political sidelines. But the focus of these dialogues is on the exploration of philosophical principles and the analysis of Roman society rather than on “immediately applicable prescriptions for political action.”²⁶ It is Cicero’s concern with first principles that places *De republica* and *De legibus* alongside the writings of Plato and Aristotle as works whose political philosophies transcend their immediate contexts and continue to be relevant long after the decline of the Roman Republic or Greek *poleis*. I return to this point in the conclusion, which briefly shows how more recent thinkers still grapple with some of Cicero’s basic concerns.

My main business in this book is explication and interpretation. Accordingly, it is primarily written for students and scholars working on Greek and Roman philosophy and political thought, particularly those focusing on Cicero, Roman and Hellenistic political philosophy, and the reception of Plato. However, I have tried as much as possible to make this book accessible to historians of political thought and political theorists who, though not necessarily specialists in ancient thought, may nevertheless find certain conclusions of this study to be of interest. This book restores Cicero’s *Laws* to its rightful place as an important and sophisticated treatment of natural law theory. As for the *Republic*, Cicero’s treatment of the mixed constitution forces us to revise our understanding of this important concept by revealing that there are in fact on offer in antiquity (and beyond) two competing theories

have briefly argued that these dialogues deal primarily with first principles: for the *Republic*, see Zetzel (1995) 27–9; for the *Laws*, see Dyck (2004) 15–20.

²⁶ For the examination of philosophical principles, the analysis of particular societies, and prescriptions for immediate action as three different levels of political thought, see Nichols (1979) 129, which is the source of the quotation.

based on alternative political sciences. The dialogue also calls into question the widely held view that rights is a modern concept which is inextricably linked to individualistic accounts of society.

While I believe that Cicero's thought is of more than historical interest, apart from the conclusion I do not seek in any sustained and systematic fashion to apply his thought to present debates in political theory. My purposes are rather less ambitious. My most earnest desire in writing this book is to convey something of the literary and philosophical richness of two important works whose achievements have long been obscured by historical accident and difficult interpretive problems. If by doing so I am able to awaken in even a few readers the conviction that Cicero's political philosophy rewards sustained and careful study, then the efforts in writing this book will have been repaid with interest.

CHAPTER I
READING THE *REPUBLIC*

Contemporary philosophers share their scholarship primarily through a very small range of written media with well-defined conventions. Turn to the history of philosophy, however, and the options expand considerably. The treatise, dialogue, letter, diatribe, meditation, commentary, aphorism, inscription, and even poem find places alongside the journal article and scholarly monograph as media for practicing and communicating philosophy. Of these forms of writing, the dialogue has had an especially long, if somewhat spotty, history as a form of philosophical discourse. Plato, Xenophon, and other followers of Socrates wrote dialogues. Early Christians such as Justin Martyr, Minucius Felix, and St. Augustine occasionally employed the form, as did Boethius and Abelard. Cicero, Hume, Santayana, Malebranche, Murdoch, and Wittgenstein all experimented with the genre.

These philosophers decided to write dialogues for a variety of reasons and adapted the genre to suit these purposes. The dialogue as a genre does not admit of one single form, nor is there likely a single rationale for its employment.¹ From its beginning as a literary genre in classical Athens, the dialogue has always been “a conflicted, self-conscious and multiple form.”² In particular, multiple possibilities exist for negotiating the relationship between a writer’s authoritative views and their potential subversion by the fictional nature of the dialogue with its multiplicity of voices. Some dialogues are aporetic, skeptical, and open-ended, while others are more dogmatic and demanding of the reader’s assent. Sometimes writers choose to write themselves into the dialogue or to cast one of the characters as a spokesperson for their views. At other times,

¹ Indeed, A. Long (2008) argues that one cannot identify a single rationale for philosophical dialogue even if one limits the field to Plato.

² Goldhill (2008) 4.

the author's philosophy emerges only indirectly through a consideration of the arguments of the characters and their dramatic performances taken as a whole – if it is to be discovered at all. The different possible ways of constructing a dialogue make it necessary for the reader of any given dialogue to proceed with care.³

Cicero wrote both his *Republic* and *Laws* in dialogue form. The latter consists of a conversation between Cicero, his friend and correspondent Atticus, and his brother Quintus. No precise dramatic date is indicated, but we may reasonably assume that this fictional conversation was set at or near the time of its composition in the late 50s BC.⁴ Cicero's character leads the discussion in the dialogue's three extant books just as the Athenian Stranger dominated the conversation in Plato's own *Laws*. In fact, one likely reason for Cicero's presence in *De legibus* is that he judged that the Athenian Stranger represented the views of Plato himself (*Leg.* I.15).⁵ As a consequence of this, while the dialogue is fictive insofar as it is a literary production rather than the transcript of an actual conversation,⁶ Cicero answers for us the fundamental interpretive question of whether any given character in the dialogue speaks for the author. Cicero the character speaks on behalf of Cicero the author just as (so Cicero thought) the Athenian Stranger represents the views of Plato the author.⁷

³ To put the point somewhat differently, one must be aware that not every instance of the genre "dialogue" is equally dialogic, especially if one understands the latter term to entail the denial that truth exists independently of the collective search for truth, as does Mikhail Bakhtin at Bakhtin (1984) 110. Consequently, Bakhtin argues that Plato's later dialogues betrayed their form and became monologues.

⁴ Scholars now generally assume that Cicero composed the extant portions of *De legibus* during the 50s along with *De republica* and *De oratore*. For a thorough discussion of issues concerning the dialogue's date of composition, see Schmidt (1969).

⁵ Cicero's view was probably not unique in antiquity. Diogenes Laertius similarly reports that the Athenian Stranger was a vehicle for Platonic doctrine (DL 3.52). Modern commentators agree that there is far less authorial detachment in the *Laws* than in other dialogues (see e.g., Bobonich (1996)).

⁶ It is unlikely that the conversation recorded in *De legibus* ever occurred. As James Zetzel (1999) xxii points out, given what we know of the characters' biographies "there seems to be no possible date on which the three participants could have met at Arpinum."

⁷ However to say that Cicero's character communicates the views of Cicero the author is not to claim that the author speaks *only* through the explicit statements of this character. As we will see in Chapters 5 and 6, Cicero the author at places also speaks through the dramatic action of the dialogue. Thus, the views of Cicero the author are not completely reducible to the utterances of Cicero the character.

The construction of *De republica* is somewhat different. Like *De legibus*, Cicero composed the work in the late 50s. And again like its companion piece, Cicero himself is present. However, his presence is limited to prefaces, which accompany each of the three pairs of books that make up the work. The dialogical part of the work consists of a conversation that took place among a group of Roman statesmen in the winter of 129 BC (*Rep.* 1.14). The leading character is the general and statesman Scipio Africanus Aemilianus, consul twice over and sacker of Carthage in the Third Punic War. In such a conversation among “historical characters” (*in antiquis personis*) set well before his birth, Cicero himself is “forced to be silent,” as he points out in a letter to his friend Atticus dated to June of 45.⁸ In this same letter he stresses that his absence from *De republica* and its predecessor *De oratore* represents an important difference from the dialogues of the later cycle of 46–44 BC.

I had resolved to include no one who was still living in my dialogues. But because you wrote that Varro desired this and he judged it to be of great value, I completed and finished off the entire Academic enquiry in four books. I don’t know how well I did, but I worked with the utmost care. In them those arguments which Antiochus had brilliantly gathered against ἀκατοληψία I gave to Varro. To these arguments I myself respond. You are the third member of our conversation. If I had made Cato and Varro dispute among themselves, as I was advised by you in your last letter, my part would have been a silent one. I find this practice agreeable in those dialogues with historical characters, as Heraclides did in many dialogues and I myself did in the six books of my *Republic* (*De republica*). I did likewise in *On the Orator* (*De oratore*), which I especially liked. In these books too, the characters are such that I was forced to be silent ... The speech is constructed so as to take place when I was a boy, with the result that there was no part for me. However, the dialogues which I have recently written follow the Aristotelian pattern in that the speeches of the other characters are constructed so that the lead role is with me.⁹

Cicero omits a couple of interesting details from this letter.¹⁰ He makes no mention of *De legibus*, a dialogue which still bears a closer resemblance to *De oratore* and *De republica* even if it shares the feature of direct authorial presence with the dialogues of the later cycle. He also omits the fact that he did speak directly

⁸ Cic. *Att.* 13.19.4.

⁹ Cic. *Att.* 13.19.3–4. ¹⁰ See also Schofield (2008) 75–6.

in the prefaces of *De republica* and *De oratore*. And so Cicero's claim that the historical setting of *De republica* forced him to be silent appears to be misleading; after all, he still found a way to speak in the prefaces. But Cicero's claim to be silent in *De republica* is potentially misleading in a second way. As every reader of Plato knows, the fact that the author of a dialogue nowhere speaks in his own voice does not mean that he does not speak. He may, after all, speak through the words of a character or characters and the dramatic features of the dialogue. Therefore, even though Cicero limits his remarks *in propria persona* to the prefaces, we may wonder whether he really is silent in the substantive conversation of *De republica*. And if he does speak in the dialogue, by what means does he do so? These are important and fundamental questions, for to ask them is another way of asking how to read the dialogue profitably. It is the purpose of this chapter to work out an answer. I argue that the key to reading *De republica* is to recognize that the dialogue is the product of a writer with a highly developed awareness of his own authority and authorial presence.

Skepticism and authority

Readers of Cicero's speeches are accustomed to a writer who is unafraid to write himself into his works. Consider for instance his speech on behalf of Publius Sestius, whom he defended in 56 BC. Sestius was charged with committing an act of public violence. Cicero's strategy was simple: construe "public violence" as violence against the commonwealth; identify the welfare of the commonwealth with his own welfare; and then demonstrate that Sestius acted in his (Cicero's) interests. The jury seemed to buy it. No violence against Cicero; therefore, no violence against the commonwealth. Defendant acquitted.¹¹ A man who thinks highly enough of himself to identify publicly his own welfare with that of the commonwealth would seem to lack little in the way of self-confidence and boldness.

Yet Cicero is not always so eager to promote his own views and opinions. In a letter to his brother Quintus, written two years after

¹¹ For Cicero's basic argumentative strategy in *Pro Sestio*, see Kaster (2006) 22–31.

Pro Sestio in 54 BC, he discusses the composition of *De republica*. He is especially concerned by the reaction of his friend Sallustius to the dialogue's historical setting.

Sallustius was listening when the two books were read to me in Tusculum. I was advised by him that these matters would be portrayed with much greater authority (*multo maiore auctoritate*) if I myself spoke on the commonwealth, especially since I am not Heraclides Ponticus, but a consul and someone who is experienced in the greatest affairs of the commonwealth. He said that those arguments which I attribute to such ancient men would appear to be made up.¹²

Though shaken by Sallustius' criticisms, Cicero did not in the end follow his friend's advice, but instead retained the historical setting of the dialogue. Why did Cicero not rewrite the dialogue as a treatise? Or if he was set on using the dialogue form, why did he not write himself into the dialogue as the main spokesman as he would do in *De legibus* or the later dialogues that follow the "Aristotelian pattern"? Why pass on an opportunity to exert greater authority in *De republica*?

A little later in the letter Cicero explains that he had initially decided to set the dramatic date of the dialogue in the past because he feared offending his contemporaries.¹³ James Zetzel suggests that "the offense he feared was political."¹⁴ There is evidence to suggest that a cautious Cicero did worry at times during the 50s that his own views on political matters could lead to persecution. In a letter to Atticus from 59 BC he writes: "I shall write briefly to you concerning the commonwealth (*de re publica*), for I am already beginning to grow fearful that the very paper may betray me. And so hereafter if I need to write to you at greater length about such matters, I shall conceal my meaning with veiled language (ἀλληγορίαις)."¹⁵ Cicero would indeed write at greater length "on the commonwealth." Within five years of this letter, he would begin work on his lengthiest and most elaborate treatment of the subject. Perhaps it is no coincidence that Cicero began working on *De republica* after Caesar, Crassus, and Pompey met in 56 BC at Luca where they divided up political power and agreed that Cicero's voice, at least with respect to politics, should be much fainter.

¹² Cic. *Q. Fr.* 3.5.1.

¹³ Cic. *Q. Fr.* 3.5.2.

¹⁴ Zetzel (1995) 4.

¹⁵ Cic. *Att.* 2.20.3.

However, Cicero also had philosophical reasons to consider carefully how he utilized his authority in his writings. Writing in the preface of *De natura deorum*, he rebukes readers of his dialogues for enquiring into his own views lest they adopt a position on the basis of his authority rather than the weight of the evidence.

However, those who seek what I myself believe about a given matter exhibit more curiosity than is necessary. For in discussion it is not so much the weight of authority (*auctoritatis*) as the weight of reason (*rationis momenta*) that must be sought. Indeed, the authority (*auctoritas*) of those who profess to teach is often a hindrance to those who want to learn. They stop applying their own judgment (*suum iudicium*) and hold as certain that which they think was resolved by the teacher whom they approve.¹⁶

Cicero had more reason to reject Sallustius' suggestion to exert greater authority in the dialogue than mere political prudence: the improper use of authority hinders the reader from applying his or her own judgment (*suum iudicium*). According to Cicero, the liberty to exercise one's own judgment is not just important for philosophical education; it is also essential for philosophizing. The reason for this involves Cicero's own philosophical allegiance.

Cicero was a life-long member of the New Academy, skeptical followers of Plato.¹⁷ The designation "skeptical" can be confusing. Unlike radical versions of skepticism on offer in both Cicero's day and our own, skepticism on Cicero's view does not require one to forgo all positive positions.¹⁸ As he stresses time and again, skepticism consists of the second-order position that one is free to adopt whatever answers to a variety of first-order questions seem most persuasive. The skeptic of course must bear in mind

¹⁶ Cic. *Nat. D.* 1.10.

¹⁷ This is the standard view among scholars and is supported by Cicero's own writings. Indeed, we have evidence of his commitment to skepticism in his first work, *De inventione*, and his last, *De officiis*. There has been occasional scholarly dissent, however. Gucker (1988) and Steinmetz (1989) have independently argued that Cicero left the New Academy shortly before composing *De republica* and *De legibus* only to reconvert before writing the later cycle of dialogues. For a response to the conversion thesis, see Görler (1995). See also Chapter 5.

¹⁸ It is important to note that Cicero studied with Philo of Larissa, an Academic skeptic who believed that it was consonant with skepticism to hold positive viewpoints under the appropriate conditions. For Philo's philosophy, see Brittain (2001). For brief comparisons of Philo's skepticism and Cicero's, see esp. 258–9 and 275–6 n. 42.

that his position is always open to challenge and revision; certitude is impossible. But given these conditions, the Academic skeptic is free to follow the evidence wherever it may lead and embrace whatever viewpoints seem to be “more weighted towards the appearance of the truth.”¹⁹ This is essentially what it means to exercise one’s own judgment, a freedom that is only possible provided that the philosopher maintains a critical distance from the authorities’ views on a given issue. This perspective informs even the most dogmatic of Cicero’s works. For example in *De officiis* Cicero finds that he is able to draw on the Stoics “as much as and in what way seems right according to my judgment and opinion (*iudicio arbitrioque nostro*),”²⁰ but also urges young Marcus not to let his father’s views hinder him from exercising *his* own judgment on these matters.²¹ And Cicero famously concludes *De natura deorum*, the very dialogue in which he warns the reader about inquiring too closely into his own views, by casting his vote for the argument of the Stoic rather than that of the representative of his own Academy. By adopting this stance, Cicero demonstrates to the reader the radical Academic freedom to follow any argument that at the time seems to most closely approximate the truth.²²

Cicero believed that Socratic discourse, especially as presented in Plato’s dialogues, represented an unsurpassed medium for both practicing philosophy and presenting it to his fellow Romans. In a memorable passage from the *Tusculan Disputations* Cicero writes:

However, Socrates first called philosophy down from heaven and placed her in cities and brought her into homes and forced her to inquire into life and customs and things good and evil. His versatile manner of argumentation and the variety of topics of discussion and the greatness of his intellect, which have been immortalized by the memory and writings of Plato, have produced many schools of philosophers in disagreement among themselves. Of these, I have followed particularly that school which I believe is agreeable to Socratic practice in concealing my own opinion, relieving others from error, and in every discussion seeking what is the greatest approximation to the truth (*simillimum veri*). Carneades

¹⁹ Cic. *Nat. D.* 3.95. ²⁰ Cic. *Off.* 1.6.

²¹ Cic. *Off.* 1.2.

²² Cic. *Nat. D.* 3.95. Presumably, though, this freedom only extends to substantive positions and not to the second-order question of whether one can hold any position as unqualifiedly true.

employed this practice very skillfully and fully, and I often constructed other dialogues – most recently those taking place in Tusculum – so that I argued according to this practice.²³

As this passage indicates, Cicero conceived of Socratic discourse along fundamentally Academic lines.²⁴ Not only does he represent Socratic speech as aiming at the “greatest approximation to the truth” – the goal of philosophical enquiry according to Academics – but he also cites the influential Academic skeptic Carneades as a fellow practitioner of this model.

Moreover, Cicero also seems to indicate that the Socratic practice of concealing one’s opinion, removing error, and seeking the greatest approximation to the truth – his explicit rationale for the dialogue form of the *Tusculans* – transcends different types of dialogue. For instance, in the preface to *De natura deorum*, Cicero affirms as his purpose the same elements of the Socratic discourse presented in the *Tusculans*: to remove ignorance and educate;²⁵ to discover what most approximates the truth;²⁶ and, as the passage quoted earlier illustrates, to exercise his authority such that his own views do not dissuade the reader from sifting through the evidence for him- or herself.²⁷ Yet although *De natura deorum* affirms the same basic principles articulated in the *Tusculans*, the forms of the two dialogues are very different.²⁸ The former presents the competing theological positions of the Epicureans and Stoics in the first two books and an Academic response in the third without dialectic or direct exchange between the speakers. Each book consists of long, uninterrupted expositions of the views of the school whose turn it is to receive a hearing. Cicero himself plays only a small role in the dialogue. The main spokesmen – Velleius and Balbus, the Epicurean and Stoic speakers about whom we know little, and the Academic Cotta, about whom we know somewhat more – are described as leaders of their respective

²³ Cic. *Tusc.* 5.11.

²⁴ Cicero when speaking in his own voice consistently represents Socrates, along with Plato, as the forerunner of Academic philosophy and philosophical discourse. For discussion of relevant passages, see Glucker (1997).

²⁵ Cic. *Nat. D.* 1.2–3, 7–8. ²⁶ Cic. *Nat. D.* 1.2, 12; 3.95.

²⁷ Cic. *Nat. D.* 1.10.

²⁸ For the uniqueness of the dialogue form of the *Tusculans*, see Douglas (1995).

schools.²⁹ On the other hand, in the *Tusculans* the anonymous and undeveloped interlocutors presented only as M. and A. engage in a direct discussion of a range of questions such as how one should view death or the proper role of the emotions. The speakers do not take turns at systematically presenting the arguments for the various competing philosophical systems. On Cicero's account, then, there may be multiple ways of constructing a dialogue while still abiding by what he takes to be the essential achievements of Socratic discourse.

The versatility of Academic-Socratic discourse is the reason why Cicero can try out multiple ways of constructing dialogues. He can even accept the alternative of writing himself into the dialogue as a major character, as he does in such dialogues as the *Academica*, *De divinatione*, and *De finibus* – provided he takes appropriate measures to exercise his authority in such a manner so as not to impede the judgment of the reader.³⁰

Cicero, it is now clear, could not have exercised the type of authority in *De republica* that Sallustius advised. Even if he had deemed it politically expedient to commend his views on politics on the basis of his own authority, his commitment to skepticism would not have permitted him to do so. But the question remains: why write himself out of the conversation about substantive issues of political philosophy as the means of achieving the appropriate management of his authority? He could just as easily have written himself into the dialogue as a main character and employed such Socratic devices as irony to conceal his own views.³¹ However, while the concern with authority that Cicero expresses while composing *De republica* is consonant with the Academic-Socratic approach, the work itself has a specific literary model that his later cycle of dialogues lacks. While his use of historical settings probably owed something to Heraclides Ponticus, whom we have already seen Cicero mention in two letters as a noteworthy practitioner of this technique, there can be no doubt what literary model

²⁹ See Cic. *Nat. D.* 1.16.

³⁰ For discussion of some of the ways in which Cicero accomplishes this in these and other "Academic" dialogues, see Schofield (2008) 70–4.

³¹ Several Ciceronian passages present Socrates as an ironist who conceals his views, including *De oratore* 2.270, *Brutus* 292, 299, and *Academica* 2.15. For commentary on these passages, see Glucker (1997) 65–71.

was foremost in Cicero's mind: the dialogues of Plato, the philosopher who never speaks in his own voice.

Platonic dialogue

During the 50s Cicero was reading Plato carefully – especially the *Republic*. How the dialogue form of *De republica* manifests the fruit of this study will soon be clear. But we should not forget that the two dialogues that bookend *De republica* – *De oratore* and *De legibus* – are also formally Platonic dialogues.³² The casting of characters, the conversations, and the drama of these dialogues are arranged according to Platonic precedent. Indeed, Cicero himself explicitly acknowledges his debt to Plato on this account. In another letter to Atticus, written just after he had begun work in earnest on *De republica*, Cicero explained to his friend that he had modeled Scaevola from *De oratore* on the character of Cephalus from Plato's *Republic*. Just as old Cephalus had left the conversation in Book I to attend to religious matters, so aged Scaevola departed early from the discussion in *De oratore* because Cicero judged that the man was too old to endure a lengthy discussion and thought that Plato had removed Cephalus for the same reason.³³

As for *De legibus*, not only does Cicero suppose that Plato provides a precedent for casting himself as the leading character, but he also draws inspiration for the dialogue's setting from Plato's *Laws* and *Phaedrus*. As in these works, the conversation in *De legibus* takes place on a hot summer's day, and, following Socrates' example in the *Phaedrus*, Cicero and his associates seek the shade beneath trees along a riverbank (*Leg.* 2.6–7).

Moreover, Atticus and Quintus are precisely the kind of friendly but critical interlocutors who confront Socrates in such dialogues as Plato's *Republic*. Just as Socrates' friendly interlocutors at points push and prod him to strengthen the argument or supply additional details,³⁴ so Quintus and Atticus challenge Cicero's proposals on more than one occasion (*Leg.* 3.18, 19–22, 26, 28–9, 33, 34–7). In

³² See also Zetzel (1995) 5 and Schofield (2008) 76.

³³ *Cic. Att.* 4.16.3.

³⁴ See e.g., *Pl. Resp.* 2.357a–b, 2.362d, 2.372c, 5.449b–c.

fact, at times their recalcitrance surpasses even that of Adeimantus and the spirited Glaucon of Plato's *Republic*. The brothers were initially willing to give Socrates a pass on his infamous proposal for the communality of women and children among the guardians in his best regime. Indeed, when Socrates made the proposal in Book 4, Adeimantus immediately agreed that "this would be the most correct arrangement."³⁵ It is only at Polemarchus' urging at the beginning of Book 5 that his interlocutors challenge Socrates to fill in the details of this proposal. Cicero's interlocutors are less docile. When Cicero's character mentions an institution (in this case the tribunate) which he, like Socrates, hopes to pass over, his interlocutors immediately challenge him. The conservative Quintus forces his brother to elaborate on the extent of the tribunician power and then subsequently takes him to task for allotting too much power to this populist institution. Despite Cicero's best efforts, Quintus will not agree. Cicero reminds his brother that in such a conversation it is customary for the interlocutor to say "Quite so" or "True enough" to move the conversation along, no doubt with reference to the practice of Socrates' friendly interlocutors (*Leg.* 3.26).

Plato's *Republic* inspired some minor points of detail in *De oratore* and *De legibus*. It left a much larger mark on the dialogue form of *De republica*. Not only are the dramatic dates of both dialogues set in the past at a time when the author himself is not present, but both conversations also take place during religious festivals.³⁶ Both dialogues include narrative as well as dramatic performance: in each case a narrator decides to recount from memory a past conversation.³⁷ In the case of Plato's *Republic*, the narrator is Socrates, who also participated in the conversation. In *De republica* Cicero himself recounts the conversation as he received it at second-hand from Publius Rufus, one of the participants. Cicero also mirrors the conversational style and literary devices found in Plato's work: Scipio's Book 1 account is punctuated by Socratic dialectic

³⁵ Pl. *Resp.* 4.424a. ³⁶ Cic. *Rep.* 1.14 and Pl. *Resp.* 1.327a, 1.354a.

³⁷ Cic. *Rep.* 1.13 and Pl. *Resp.* 1.327a–328c. Not all Platonic dialogues contain this mix of narrative and drama. Plato's *Laws*, for example, contains only drama. The fact that Cicero's *De legibus* likewise abandons narrative is yet another indicator of his attentiveness to the form of the Platonic dialogues.

(1.56–63) and Scipio's dream with which the work concludes is the literary counterpart to the Myth of Er at the end of Plato's *Republic*. Moreover, in both *Republics* the dark shadow of death looms over the discussion of politics: each dialogue foreshadows the death of its main character. In one of Plato's most vivid and memorable passages – the allegory of the cave – Socrates suggests that the inhabitants of the cave would mock and put to death the person who would try to deliver them from their shadowy prison and lead them to the light.³⁸ And in the most widely read and beautiful portion of *De republica* – the Dream of Scipio – Scipio's grandfather alludes to his grandson's uncertain fate and impending death (*Rep.* 6.16 = 6.12). Indeed, the dramatic date of the dialogue is set just days before Scipio's death.

One final characteristic common to both Cicero's *De republica* and Plato's *Republic* (and indeed to the rest of Plato's dialogues) remains. It concerns the feature that Cicero claimed had separated this work from his later cycle of dialogues in the letter of June 45: the author's silence.

The rather simple fact that the author does not speak in his own voice has spawned a minor industry of literature by students of Plato in recent years. Although the view that Socrates and the other major characters in Platonic dialogues served as mouthpieces for Plato's own views has an ancient ancestry and still has its adherents,³⁹ many contemporary readers of Plato recognize that the Platonic dialogue is a rather complex literary form requiring the reader to attend to features of the dialogue beyond the words of the leading character.⁴⁰ Consider, for instance, John Cooper's discussion of the Platonic dialogue form in the introduction to his widely used collection of Plato's writings.

³⁸ *Pl. Resp.* 7.516e–517a.

³⁹ Diogenes Laertius, a third-century AD biographer of Greek philosophers, explicitly states that the major characters of Platonic dialogues were mouthpieces for Plato's own views (*DL* 3.52). Aristotle too often writes as if positions taken by Socrates represent Plato's own convictions. With respect to Plato's *Republic*, Aristotle critiques Socrates' proposals for his ideal city as if Plato had put them forward as his own serious proposals for implementation (*Arist. Pol.* 2.1–5).

⁴⁰ Scholars differ greatly on the extent to which such features contribute to the message of the Platonic dialogue and on Plato's rationale for writing dialogues. In fact, the answers to these questions may very well vary from dialogue to dialogue. For discussion of these

You must work hard even to find out what the author of a Platonic dialogue is saying to the reader – it is in the writing as a whole that the author speaks, not in the words of any single speaker – and the dialogue form demands that you think for yourself in deciding what, if anything, in it or suggested by it is really the truth. So you have to read and think about what each speaker says to the others (and also, sometimes, what he does not say), notice what may need further defense than is actually given it, and attend to the author's manner in presenting each character, and the separate speeches, for indications of points on which the author thinks some further thought is required. And, beyond that, you must think for yourself, reasoning on the basis of the text, to see whether or not there really are adequate grounds in support of what it may appear to you the text as a whole *is* saying. In all this, Plato is being faithful to Socrates' example: the truth must be arrived at by each of us for ourselves, in a cooperative search, and Plato is only inviting others to do their own intellectual work, in cooperation with him, in thinking through the issues that he is addressing.⁴¹

Such a method of interpreting Plato certainly does not require the reader to hold that Platonic dialogues are devoid of positive teachings. A dialogue such as the *Republic* contains positive political doctrines, some of which perhaps may even be endorsed by Plato himself. However, although the *Republic* communicates a message, it also performs an action in the reader: it prods the reader to join in the investigation and do philosophy for him- or herself.⁴²

With this brief summary of both the nature of the Platonic dialogue and the demands it places on the reader, I am now able to introduce the key to reading Cicero's *Republic*. Like Plato in the *Republic*, Cicero writes not only to communicate political principles but also to encourage the reader to perform the activity of political philosophy. Just as on Cooper's model Plato uses the artistic qualities of his dialogues to promote fundamentally Socratic aims, so the form of *De republica* is a product of Cicero's typical Academic-Socratic concern with the responsible expression of his authority and the artistry of the Platonic dialogue. Let's see how he achieves this.

questions by multiple scholars of various methodological persuasions, see Griswold (1988). Since then, scholarly attention to Plato's manipulation of the dialogue form has greatly increased. For an overview of the current *status quaestionis* and further bibliography, see McCabe (2006).

⁴¹ Cooper (1997) xx.

⁴² For this effect, see Clay (1988) and M. Frede (1992).

An invitation to political philosophy

Cicero prepares the reader to engage with political philosophy with a lengthy preface in his own voice. Indeed, the elaborate and carefully crafted introduction to the dialogue far exceeds the length of the prefaces to any of Cicero's other extant dialogues.⁴³ While the fragmentary nature of the preface renders any conclusions provisional,⁴⁴ the surviving text suggests that Cicero exercises his authority in order to provide a preliminary defense of political philosophy before his Roman audience. Drawing on his own experience, he attempts to identify appropriate cultural space within which Romans may accept his invitation to engage in political philosophy.

Perhaps it is Cicero's model that best illustrates the precarious position occupied by political philosophy as an undertaking whose success is challenged by its very nature. Plato's *Republic* suggests that a philosophical consideration of politics is threatened by both politics and philosophy. On the one hand, the would-be political philosopher is pulled away from the philosophical life by the lure of the political life and the power, glory, and honor which it has to offer; and if he does resist this allure, the philosopher will have to endure the city's hostility to philosophy.⁴⁵ On the other hand, the philosophical consideration of politics is threatened by the tendency of the philosophical life to devalue the city and the life of politics.⁴⁶ The problematic nature of political philosophy was not lost on Plato's students. Aristotle too underscores this tension in his *Nicomachean Ethics* when he first argues for the absolute superiority of the life of philosophical contemplation at 10.7 only to modify these claims as he turns his focus towards political philosophy at 10.9.

This classical discussion of the competing claims of the philosophical and political lives colors Cicero's introduction to *De republica*. The extant portion of the text begins with Cicero taking aim at philosophical detractors of politics. Nature has granted

⁴³ See Zetzel (1995) 95.

⁴⁴ Zetzel (1995) 95 estimates that the seventeen leaves that are missing from the preface to Book 1 represent slightly more of the original preface than the portion that survives.

⁴⁵ See Pl. *Resp.* 7.517a. ⁴⁶ See Pl. *Resp.* 7.519c–520d.

to human beings the need for virtue, which – unlike an art (*ars*) – necessarily consists entirely in its employment. Because nature has also endowed human beings with the desire to promote the common welfare, virtuous activity cannot consist merely of god-like contemplation abstracted from political concerns. Rather, “the greatest employment of virtue lies in the governance of the state” (*Rep.* 1.2). Like Aristotle before him,⁴⁷ Cicero weighs the respective capacities of the persuasiveness of philosophical argumentation and the coercive force of law to maintain political society, and finds the former wanting. Because of the limited effectiveness of rational persuasion, the statesman is of more value to the state than the philosopher is (*Rep.* 1.3). The preface’s first argument, then, concludes by offering a political devaluation of philosophy in response to the philosophical devaluation of politics.⁴⁸

Cicero goes on to offer several more arguments in support of political participation. Of special interest is his argument against such philosophers as the Epicureans who allow for the philosopher to rule only if compelled by necessity. During times of exceptional distress, the philosopher may take the helm of the state. This view, according to Cicero, does not adequately reflect the nature of political knowledge.

Like Aristotle, Cicero suggests that political knowledge is a capacity (*potestas*) acquired through practical experience (*Rep.* 1.10).⁴⁹ Philosophers with no experience in politics possess no real claim to political knowledge (*Rep.* 1.11), while those who were truly wise “were experienced” in political affairs (*Rep.* 1.12). In their haste to dismiss political activity as unworthy of the philosopher, Cicero believes that his opponents tacitly admit that political knowledge is derived from experience and thereby lead themselves into difficulty. “Those men often speak openly and indeed take pride in the fact that they have never learned nor teach anything concerning the principles of either establishing or conserving commonwealths. They think that the knowledge of such things is granted

⁴⁷ See Arist. *Eth. Nic.* 10.9.1179b–1180a.

⁴⁸ For this observation, see Barlow (1987) 358 and Blössner (2001) 230–43.

⁴⁹ At *Nicomachean Ethics* 10.9 Aristotle argues that political knowledge is a capacity (*δύναμις*) acquired through experience (*ἐμπειρία*). For this similarity between Cicero and Aristotle, see D. Frede (1989) 83. In drawing this and other occasional comparisons to Aristotle, I do not necessarily endorse the view that Cicero must have had first-hand

not to learned and wise men, but to those who are experienced in that field” (*Rep.* 1.11). But if political knowledge is gained through experience, how can one with no experience claim to have sufficient knowledge to guide the commonwealth through grave crises?

Cicero’s account of the nature of political knowledge accords with the intuitions of his Roman audience, which takes pride in Rome’s achievements in the art of rule.⁵⁰ This is to his advantage, for Cicero has to justify *De republica* not only to philosophical detractors of politics but also to political detractors of philosophy. The main thrust of the introduction is ostensibly aimed at the former. However, Cicero also addresses a possible concern for those Romans who may be inclined to see philosophical activity as incompatible with a life of service to the *res publica*.⁵¹

A recurring theme in the preface is the proper place of *otium* or leisure in the life of a Roman. In fact, the word itself occurs eight times.⁵² Sometimes Cicero uses it in reference to a life of detachment from politics and service to the state (*Rep.* 1.1, 8, 9). At other times it refers to brief and well-deserved breaks during an active life of political involvement, such as those available to Marcus Cato and Cicero himself (*Rep.* 1.1, 7).⁵³ Cicero emphasizes that his own life is the traditional Roman life of service to the *res publica*; the *otium* that he enjoys is simply a constitutive part of this life, as recognized traditionally by Romans.

As both Greeks and Romans recognized, leisure is a prerequisite for engaging in philosophical activity. The life of philosophical detachment requires a life devoted primarily to leisure.

knowledge of Aristotle’s *Politics* and *Nicomachean Ethics*. Cicero could have gleaned “Aristotelian” ideas from Aristotle’s exoteric writings, as D. Frede (1989) 97 n. 43 speculates, or from the writings of later Peripatetics.

⁵⁰ For the classic expression of the Roman view that the art of rule was their particular area of excellence, see Anchises’ remarks to Aeneas in Book 6 of Vergil’s *Aeneid*: “You, Roman, remember to rule with power over other peoples / (these will be your arts) and to impose the ways of peace / to spare the conquered and subdue the haughty” (6.851–3). For Cicero’s exploitation of this same sentiment, see Cic. *Tusc.* 1.2, with Baraz (2012) 103–12.

⁵¹ The problem of how to “sell” philosophy to a potentially suspicious elite readership would continue to occupy Cicero in his later cycle of dialogues produced under the dictatorship of Caesar in the 40s. For Cicero’s use of the prefaces to the philosophical works of the 40s to address potential criticisms of his philosophical project, see now Baraz (2012).

⁵² For the introduction’s emphasis on *otium*, see Büchner (1984) 70–4.

⁵³ See also Cic. *De or.* 1.1–4.

Through both arguments against political abstention and the example of his own political career (*Rep.* 1.6, 7, 10, 13), Cicero makes it clear that he is not commending such a life. Rather, in the preface to *De republica*, as in the preface to *De oratore*⁵⁴ and the opening conversation of *De legibus*,⁵⁵ he suggests to his readers that his theoretical writings have a place only within the context of a lifetime of dedication to the *res publica*. His efforts in this area are a means of disposing of the well-deserved leisure available to a statesman. Political philosophy, Cicero tells his Roman readers, can be safely incorporated into the *vita activa*. Consequently, Cicero carves out a place for philosophical activity in the traditional life of the Roman statesman.

This solution may be too neat as it stands. And in fact the dialogue proper suggests that the adjudication of the competing claims of the philosophical and political lives remains a major difficulty. But regardless of whether the reader of the dialogue eventually decides to reject this initial solution, Cicero succeeds in delineating an initial vantage point from which a Roman can approach a philosophical work dealing with matters associated with the Greeks.⁵⁶

Why, though, should the politically ambitious Roman attend to Cicero's work given his prior account of political knowledge? After all, if political knowledge is a product of experience, which the statesman already has, what is the need for philosophy? Once again, Aristotle preceded Cicero in addressing the problem. It is true that politicians possess a type of political knowledge and in this way surpass the Sophists, who lack all such knowledge due to their lack of experience. Still, this knowledge is incomplete.

⁵⁴ See Cic. *De or.* 1.1–4.

⁵⁵ See Cic. *Leg.* 1.9–14.

⁵⁶ The compatibility of philosophy with a life of political involvement was no less problematic for the Romans than it was for the Greeks. For the ways in which (Greek) philosophy could grate against traditional Roman values, see Fantham (2004) 49–77. Cicero appears to have changed his strategy for addressing Roman suspicion of philosophy in his philosophical works written under the dictatorship of Caesar. In these later works Cicero no longer settles for suggesting that his writing is only part of a much larger life of dedication to politics, as in *De oratore*, *De republica*, and *De legibus*. Rather, Cicero presents writing philosophy itself as beneficial to the *res publica*, as Steel (2005) 82 notes. Baraz (2012) argues that Cicero saw his translation of philosophy under Caesar as an act of patriotic service to the *res publica* at a time when more traditional avenues of political engagement were closed off to him.

Because politicians derive political knowledge from “a certain capacity and experience rather than thought,”⁵⁷ they are unable to provide an account of politics or understand the causes behind political affairs. Cicero adopts a similar position, though given his audience he tactfully makes the point positively by offering himself as an example rather than negatively by pointing out the deficiencies of politicians as Aristotle had done. He explains that he has “some capacity (*quandam facultatem*) for explaining the principles of political affairs” precisely because he is able to combine practical experience (*usus*) and his life-long desire for learning and teaching (*Rep.* 1.13). For this reason, he should be considered to be an authority (*auctor*): he is both knowledgeable about his subject and able to provide an account of it.⁵⁸

Thus far, Cicero has provided a defense of political philosophy before his Roman reader and has designated the context in which this reader may engage with philosophy. This is preparatory to the dialogue itself, which prompts readers to engage in political philosophy. Cicero makes this goal explicit in the preface to Book 3, where he likewise speaks in his own voice as narrator. Returning to the themes of the preface to Book 1, he praises the dialogue’s participants – all statesmen of varying degrees of success and at various stages in their careers – for disposing of their precious leisure by engaging in philosophical discussion. As in the case of Cicero himself, philosophical enquiry takes place within the context of civic responsibility and complements a life devoted to politics; philosophical knowledge supplements and completes knowledge gained from experience. The reader is encouraged to emulate the characters in this activity. “But if anyone has thought that he should add learning and a fuller investigation of affairs to the mental equipment which he possessed by nature or by civil institutions, like those men who are participating in the discussion described in the pages of this work, then everyone ought to esteem them above all” (*Rep.* 3.5 = 3.5). Here Cicero emphasizes the benefits of the process of engaging in political philosophy rather than any particular substantive doctrine.

⁵⁷ Arist. *Eth. Nic.* 10.9.1181a2.

⁵⁸ See OLD definition 9 for *auctor*: “A writer who is regarded as a master of his subject or as providing reliable evidence, an authority.”

As we have seen, Cicero is well aware that authority can be an impediment to philosophizing and could prohibit the reader from accepting his invitation to do political philosophy. Therefore, towards the end of the preface to Book 1, he carefully de-emphasizes his own authority as he prepares to begin the dialogue proper. Cicero himself will be the narrator and will exercise some editorial license (*Rep.* 1.13). However, the actual account that he will present is not his own.

Nor indeed is the argument that I will set out new and devised by me. Instead, I will recollect by memory the discussion of the most famous and wisest men of our state from a single generation. This discussion was reported to me and you during our youth by Publius Rutilius Rufus when we were together at Smyrna for several days. I think that virtually nothing in that discussion that pertains greatly to the science of public affairs has been omitted. (*Rep.* 1.13)

Similarly to the narrator in such Platonic dialogues as the *Phaedo* and *Symposium*, Cicero transports the reader back to an intellectual golden age by recalling an entire conversation that took place at a much earlier time.⁵⁹ The views that he is reporting were aired in a discussion that took place decades before he was born and passed along to him by one of the participants when he was a mere boy, long before he rose to prominence in politics and forensic oratory. Cicero thus substantially separates the discussion of the political theory that is to follow from his own authority as a prominent Roman politician. His presence during the discussion of substantive issues of political philosophy will be less immediate. In light of Cicero's belief that the Socrates in Plato's dialogues often concealed his own views, it is perhaps noteworthy that the strategy of attributing an account to another in order to defer the authority for what one says is a common Socratic device. To take perhaps the best-known instance, in Plato's *Apology* Socrates begins his explanation for his behavior in Athens by declaring that "not mine is the tale that I shall tell." Apollo rather than Socrates himself is responsible for Socrates' claim to know his own ignorance.⁶⁰

⁵⁹ See Pl. *Phd.* 57a–58d and Pl. *Symp.* 173a–b. I owe this observation to David Sedley.

⁶⁰ Pl. *Ap.* 20e. Socrates is quoting part of a verse from a lost tragedy of Euripides. For other examples of Socrates' deflection of authority, see Clay (2000) 102–3.

Even though Cicero defers the authority for the views that he is about to relate to Scipio and his interlocutors, the fact that he has cast himself as the narrator is significant. Because he is assuming this role, he will exercise a certain degree of editorial license. He will include not the entire conversation but only that which he deems to “pertain greatly” to the topic at hand. Consequently, he is responsible for deciding which parts of the conversation to include and which parts to omit. Along the same lines, Cicero as narrator has chosen this particular conversation because he believes that it contains all that is relevant for an account of political affairs. This suggests that for Cicero authorial detachment does not mean indifference. On the contrary, he here suggests that the dialogue will communicate political teachings that its author believes are important while simultaneously maintaining the authorial detachment requisite for prompting the reader to exercise his or her critical faculties.⁶¹

Cicero's mouthpiece?

Achieving such a delicate balance of authorial presence and absence is no easy task. On one hand lies the Scylla of an overbearing authorial presence that tends towards a dogmatic presentation of doctrines for the reader to assimilate. On the other hand looms the Charybdis of a radical doctrine-free skepticism. It is therefore well worth asking whether Cicero achieved it in the dialogue itself. Although there exists the occasional skeptical non-doctrinal reading,⁶² most readers believe that Cicero has succumbed to

⁶¹ Cicero makes a similar point in the introduction to the much later dialogue *De finibus*, where he himself does appear as a character. He emphasizes that the topics he is investigating in the dialogue are the most important ones and he himself has a stake in the discussion. In fact, views that Cicero himself has “accepted” are nestled among the compendia of all the teachings of the leading philosophical schools on the topic (*Fin.* 1.12). While one can perhaps guess what doctrines Cicero may have in mind, he remains true to his Academic-Socratic views regarding the responsible expression of authority. His character in the fifth and final book suggests that he as an Academic is free to accept whichever view seems most convincing (5.76) and the characters depart with reservations to the final speaker's arguments. As Schofield (2008) 72 observes: “We the readers are by contrast prodded by Cicero's criticisms and the divergent reactions of the participants, as they decide that it is enough debate for the moment, into wondering and probing further, in the effort to make our own minds up.”

⁶² See e.g., Fox (2007) 61–8, 80–110.

Scylla. Thus, the usual way of reading the dialogue is to adopt a version of the mouthpiece theory. The dialogue's main characters, Scipio and Laelius, serve as his spokesmen and their statements represent Cicero's own authoritative views on the matter.⁶³ The other features of the dialogue are embellishments, merely literary touches of little importance for understanding what Cicero is trying to communicate.

Yet the dialogue discourages the reader from uncritically accepting everything that Scipio and Laelius say as Cicero's own views. A close look at these supposed spokesmen reveals that Cicero has designed their characteristics with care. Arguments do not occur in a vacuum but must be interpreted in light of the particular character who has spoken them and the context in which they have been uttered. This has important implications for whether Cicero as author endorses an argument. Some bad or inconsistent arguments aired in the dialogue are clearly the sort of arguments that a person of a certain sort would make when trying to tackle a philosophical question of a certain nature in a situation of a certain kind. Such arguments are context-dependent. But the author's own views are not restricted by this context; he created it, after all!⁶⁴ If the author's characteristics (e.g., his intellectual capabilities, desires, knowledge) differ from those of the fictional character making the arguments, there is no reason to suppose that the author himself endorses the argument in question.⁶⁵ Such considerations have become well known to scholars of Plato and are among the reasons why an increasing number of scholars in Platonic studies have abandoned the mouthpiece theory. However, in the process of determining whether the author endorses a particular argument, the reader of *De republica* has a decided interpretive advantage over the reader of Plato's dialogues. Since Cicero has written himself into the prefaces, it is possible to compare the arguments and attributes of the characters with those of the author as he presents himself. When these considerations are taken into

⁶³ See e.g., Steinmetz (1989) and Blössner (2001) 216–17 n. 46.

⁶⁴ See Bakhtin (1986) 116, who stresses the limited vantage point of characters in a dialogue as well as the position of its author “outside the world depicted (and, in a certain sense, created) by him.”

⁶⁵ For an early statement of the importance of paying attention to the fictional nature of a Platonic dialogue, see Strauss (1964) 59–60.

account, it becomes clear that neither Laelius nor Scipio speaks for the author without qualification.

Consider first Scipio. Although he is an experienced statesman, Scipio also delights in philosophical study (*Rep.* 1.29, 34, 35). In fact, his first extended speech is a praise of the philosophical life (*Rep.* 1.26–29). Scipio's encomium of philosophy revisits the problem of combining philosophy and politics, which Cicero had dealt with in the preface. In particular, it acutely brings into focus the tendency of the philosophical, natural, and divine to devalue the merely political, customary, and human. The philosopher who has investigated the things of the gods is happiest thinking about nothing "except the eternal and divine, looking down on all things human and considering them inferior to wisdom" (*Rep.* 1.28). As in Plato's *Republic*, he will not return to the cave and political rule eagerly, but rather out of necessity.⁶⁶ Such a person will rule according to the law of nature rather than the civil law (*Rep.* 1.27). His is the most secure, powerful, wealthy, and blessed of lives.

This first speech illustrates why it is problematic to construe everything that Scipio says as reflecting Cicero's own thoughts, even though Cicero presents Scipio in similar terms as he presents himself – as an accomplished statesman who combines political participation and philosophical study. The vision of the philosophic life which depicts rule as something to be undertaken out of necessity was, as we have seen, one of Cicero's targets in his preface (*Rep.* 1.10–11). The view of the philosophical man who lives a blessed life free from all mental disturbance and only condescends to rule out of necessity seems far closer to the Epicurean philosophers Cicero opposed in the preface than to his own self-portrait of a harried and harassed politician suffering greatly on behalf of the commonwealth (*Rep.* 1.6).⁶⁷ Furthermore, Scipio's claim that wisdom, the intellectual virtue, is the highest virtue

⁶⁶ According to Scipio, the philosopher considers "military commands and our consulships to be among the necessary things rather than among those things to be sought" (*Rep.* 1.27). At 7.520e of Plato's *Republic* political rule is likewise regarded as something necessary. For necessity as motivation for the philosopher to return to the cave, see Pl. *Resp.* 520c: "Therefore it is necessary for each to go down in his turn into shared dwelling with the others."

⁶⁷ Zetzel (1995) 120 in fact suggests that "the entire description of the philosophic man is reminiscent of Lucretius, *De rerum natura* 2.7–13."

seems to conflict with Cicero's argument in the preface granting this honor to political virtue (*Rep.* 1.2). And for Cicero the life of political action – not the life of philosophical detachment – was the most powerful. The tension between Scipio's opening speech and Cicero's both cautions the reader against assuming that the author and Scipio always speak with a single voice and reopens the question of the relationship between philosophy and politics.

While Scipio represents the mixed life of political participation and philosophizing, Laelius, Scipio's elder and close friend, epitomizes the life devoted to politics alone. He is dismissive towards the claims of philosophy and natural science. The standard against which intellectual pursuits are to be measured is their value for "daily life" and the "commonwealth." His viewpoint is diametrically opposed to the philosophical view expressed by Scipio: matters political rather than philosophical are the "greater things" (*Rep.* 1.30); the philosophical must meet the criterion of the politically expedient (*Rep.* 1.33). In short, the political and conventional take precedence over the philosophical and natural.

Laelius turns out to be the spokesman for the city, a point that the drama of the dialogue reinforces.⁶⁸ Scipio places Laelius in the middle of his guests, in the place of honor, "in the place of the father" (*in parentis loco*; *Rep.* 1.18). In the city Laelius has authority and status. He in turn defends the authority and status of the city.

Although Scipio's characteristics are more similar to Cicero's, Laelius' opening argument turns out to be closer to Cicero's claim in the preface that the philosophers' contributions are to be measured according to the standard of political efficiency. Perhaps *he* is Cicero's sole spokesman?

Laelius' best-known contribution to the dialogue occurs in Book 3. Following the preface in Cicero's own voice encouraging the reader to engage in political philosophy, the topic of discussion turns to justice, the subject of Plato's *Republic*. In particular, the participants seek to refute the view that commonwealths cannot function without injustice and to establish that justice is a necessary attribute of every political society (*Rep.* 2.70). These

⁶⁸ See Barlow (1987) 363.

questions are logically independent – to demonstrate that every regime does not have to commit injustice is far different from demonstrating that every regime has to be just. And in fact, they are treated separately in Book 3.⁶⁹

The participants decide to address the first question by having two from their number, Philus and Laelius, present the strongest case possible for and against the proposition that commonwealths must act unjustly. As traditionally employed by such Academic skeptics as Carneades, whose infamous lectures on the topic at Rome in 155 BC are cited as inspiration for the current exchange,⁷⁰ argumentation on both sides of a question (*in utramque partem*) was a device designed to oppose dogmatic, authoritative conclusions. Far different is the purpose of this form of discourse in *De republica*. Or so it is often suggested.⁷¹ Philus' argument in support of injustice is shoddy, a weak challenge to the Stoicism to which it is opposed.⁷² The apparent weakness of his argument is due to the fact that Cicero wants the reader to support Laelius, through whom the author has presented his own justification for the Roman Empire.⁷³ But perhaps the case is not so simple.⁷⁴

Philus begins the debate. He will play a part analogous to that of Glaucon in Plato's *Republic* by taking on the role of devil's advocate to aid in the search for justice, something worth a great deal more than gold (*Rep.* 3.7 = 3.8).⁷⁵ The fact that Philus himself does not endorse the argument that he is delivering does not of course indicate that it is fallacious. In fact, he initially balks at

⁶⁹ This point has not been sufficiently appreciated by commentators, who usually assume that Scipio's treatment of the second question must build substantially on Laelius' treatment of the first. For attempts to draw a relationship between the two, see e.g., Pöschl (1936) 133 and Asmis (2004) 588–90.

⁷⁰ See Lactant. *Div. inst.* 5.14.3–5 (text included in Powell's OCT edition in a note at *Rep.* 3.7). For discussion of how closely Philus' speech reflects the historical Carneades' actual arguments, see Ferrary (1977) and Glucker (2001).

⁷¹ See Steinmetz (1989) 8 and Lévy (1992) 496–7.

⁷² See Glucker (2001) 73. ⁷³ See Morford (2002) 22–3.

⁷⁴ Zetzel (1996) and Niegorski (2012) 271 also dissent from the common view that Laelius' speech indicates Cicero's straightforward endorsement of Roman imperialism, even though they seem to endorse the view that Laelius' defense of natural law represents Cicero's own position. Zetzel (1996) 316–17 in particular takes Laelius' speech to be sufficiently nuanced to both assert and undercut Rome's claims to justice. I find this view unlikely for the reasons I give below.

⁷⁵ For Glaucon's willingness to play devil's advocate, see Pl. *Resp.* 2.358d; for the point that justice is worth more than gold, see *Resp.* 1.336e.

accepting the assignment not because he thinks the position philosophically weak, but rather because he as a Roman finds it ethically suspect (“a defense of wickedness”).

Having been cast in Glaucon’s role, Philus also pursues a similar argumentative strategy. Glaucon began his argument by asserting that justice is obedience to the law.⁷⁶ He then argued that this law, the result of a social contract, is contrary to nature, which dictates that one should seek as much “good” for oneself as possible.⁷⁷ In the course of his argument, Glaucon told the story of Gyges’ famous ring, which possessed the power to render its wearer invisible. One of the chief lessons that Glaucon drew from this account is that what is just is not the same as what is reasonable.⁷⁸ Philus, following Glaucon, also attempts to separate law from nature and the just from the rational.⁷⁹ Like Glaucon, he suggests that law is the result of a social contract that restrains our natural acquisitiveness (*Rep.* 3.17 = 3.23). And like Glaucon, he endeavors to cleave apart reason and justice (*Rep.* 3.13 = 3.27; 3.16 = 3.30).⁸⁰ Such a strategy indeed is well suited to oppose the ethical theory of the Stoics: it was characteristic of Stoic ethics to identify law with nature and justice with reason.

Laelius responds by trying to reconcile law and nature, justice and reason. In fact, his response includes the most elegant articulation of natural law theory from classical antiquity, if not in the entire history of political thought.

True law is right reason in agreement with nature, spread throughout all peoples. It is constant and eternal. It calls to duty with its commands; it deters from wrongdoing with its prohibitions. Its commands and prohibitions for the morally upright are never given in vain; but these same commands or prohibitions do not move the wicked. It is wrong for this law to be contravened, nor is it permissible to modify it in any part, and it cannot be repealed in its entirety. We cannot be released from this law by either the senate or the people, and there is no need to look for

⁷⁶ Pl. *Resp.* 2.359a. ⁷⁷ Pl. *Resp.* 2.359c.

⁷⁸ See Cooper (2004) 251.

⁷⁹ See Lactant. *Div. inst.* 5.16.2–3 (text included in Powell’s OCT edition in a note at *Rep.* 3.8–9).

⁸⁰ Philus even employs Glaucon’s illustration of the choice between the life of a persecuted just man and that of an honored and prosperous villain (Cic. *Rep.* 3.13 = 3.27 and Pl. *Resp.* 2.361a–d). When given such a choice, Philus supposes that the rational man will always choose the life of the villain.

an exegete (*explanator*) or interpreter (*interpretes*) like Sextus Aelius. There will not be one law at Rome, another at Athens, one law now, another in the future; but a single, eternal, immutable law will hold all peoples at all times. And there will be, as it were, one common teacher and ruler of all – god. He is the author, expounder, and proposer of this law. Whoever does not obey it will be fleeing from himself. As he has scorned his human nature, by this very fact he will pay the greatest penalty, even if he escapes all the other things that are commonly regarded as punishments. (*Rep.* 3.27 = 3.33)

On analogy with Plato's *Republic*, one might have expected *Scipio* to offer the refutation of *Philus'* defense of injustice just as *Socrates* undertook the responsibility of answering *Glaucón's* challenge. The substitution of *Laelius* for *Scipio* is significant. The representative of the mixed life who appreciates something of the tension between the philosophical, rational, and natural and the political, civic, and customary has yielded the floor to the defender of the city. And it is as the defender of the city that *Laelius* offers these remarks.⁸¹

Laelius' defense of the justice of the city is problematic, and the ease with which he passes over thorny problems only accentuates them. He would use nature and reason to defend the ancestral institutions and customs of Rome as well as her present empire (*Rep.* 3.34 = 3.41; 3.21–3 = 3.36–7). But the application of the eternal, abstract, and immutable principles of natural law to the human realm characterized by the temporal, particular, and contingent is a tricky business. As the Stoics whose ideas *Laelius* is appropriating recognized,⁸² nature is a ready solvent of human customs and conventions. The founder of Stoicism, *Zeno of Citium*, held that life's goal was living in agreement with nature.⁸³ Accordingly, his political thought devalued the conventional.⁸⁴ The influential Stoic *Chrysippus*, whose definition of law as "right

⁸¹ See also Barlow (1987) 369.

⁸² Scholars typically hold that *Laelius'* argument is indebted to Stoicism (though there is no consensus about the identity of Cicero's source). Ferrary (1974) argues that *Laelius'* speech should be placed within the Platonic rather than the Stoic tradition, but even he makes an exception for the fragment on natural law at *Rep.* 3.27 = 3.33.

⁸³ For this formulation of the goal of life, see DL 7.87 = LS 63c.

⁸⁴ See DL 7.32–3 = LS 67b for some basic elements in *Zeno's Republic*. Among its radical teachings was the abolition of coinage. Commenting on this inheritance from the Cynics, Schofield (1999b) 13 points out: "Coinage was a metaphor for all conventions: all were to be disregarded or flouted, since they stand in the way of the life according to nature and shackle our freedom."

reason” (ὁρθὸς λόγος) bears a likeness to Laelius’ similar rendering (*recta ratio*),⁸⁵ held all existing laws and constitutions to be in error.⁸⁶ Given nature’s corrosive capacity, if one is to accept it as the standard in political matters, then in order for the customary to be preserved one must provide an account of how it meets this standard. The palimpsest and fragments provide no evidence that Laelius is up to the task.

In fact, quite the opposite is the case. Laelius first attempts to justify Rome’s empire as natural by appealing to psychology. Just as it is right and natural for reason to rule absolutely over the passions, so Roman rule over its inferior allies is right and natural (*Rep.* 3.21–3 = 3.36–7). Interestingly, Scipio had employed a similar psychological model of the absolute rule of reason earlier in the dialogue (*Rep.* 1.59–60).⁸⁷ At that time, Laelius himself had found this argument to be inadequate. Moreover, as the next chapter will show, the dialogue’s intervening account of the development of the Roman constitution had called into question both the practicality and the desirability of the absolute rule of reason. By this point in the dialogue, the justification of rule in the name of implementing complete rational control fails to carry conviction.

But perhaps the rule of reason can be saved. Could Laelius not have offered an account whereby human customs, laws, and states, though retaining their temporal, contingent, and particular qualities, participate in or derive from the eternal, unchangeable, and general rule of reason? Indeed, this is precisely what he would have to produce to counter Philus, who had pointed to the particularity, contingency, and temporality of laws as evidence that natural law is not the source of justice.

However, it is unlikely that Laelius’ speech contained such an account. In his description of natural law, Laelius does not allow that the tricky task of applying the general and immutable principles of natural law to particular circumstances requires the exercise of practical wisdom. He instead argues that there is no need for an interpreter or exegete like Sextus Aelius, the jurist known as the “wise one” (*Catus*), who wrote a work interpreting

⁸⁵ See DL 7.88 = LS 63c. ⁸⁶ See *SVF* 3.324.

⁸⁷ For further discussion, see [Chapter 2](#).

and applying the laws of the Twelve Tables. Significantly, Laelius had cited Sextus Aelius' accomplishments as an example of the exercise of practical wisdom earlier in the dialogue (*Rep.* 1.30). By denying the need for a wise interpreter to mediate between the natural law and the particular laws of such states as Rome, Laelius places himself in a philosophical straightjacket from which he is unable to escape. In the conclusion of his oration (preserved in the palimpsest so we know that it is in fact the end), he suggests that through the observance of her ancestral customs, Rome too could possess the attribute of eternality (*Rep.* 3.34 = 3.41).⁸⁸ In his attempt to reconcile Rome's rule with natural law, he is forced to deny that contingency, temporality, and change are characteristic of *all* human affairs. This contradicts not only his own earlier claim that reason must yield to contingency (*Rep.* 2.22) but also the fundamental political teaching of the dialogue, as later chapters will reveal. In assigning the attribute of eternality to political affairs, Laelius is reduced to grasping at straws.

With the thorny issue of how to reconcile the claims of Roman empire with natural law apparently still unresolved, Scipio enthusiastically congratulates Laelius on the "sweetness" of his speech (*Rep.* 3.34 = 3.42).⁸⁹ But does he accept the argument? The text breaks off, so it is impossible to know for sure. When it picks up again, Scipio has already moved on to address the next part of their assignment – the question of whether justice is a necessary element of political society (*Rep.* 3.35 = 3.43–5). Significantly, Scipio's treatment of the topic makes no reference to the sort of natural law theory that Laelius had just presented. Rather, his argument turns on his definition of *res publica* in Book I, which has

⁸⁸ Laelius concludes with the following words: *tamen de posteris nostris et de illa immortalitate rei publicae sollicitor, quae poterat esse perpetua si patriis viveretur institutis et moribus*. "However, I am worried about our descendants and about the immortality of our commonwealth, which could be eternal if we were to live according to the traditions and customs of our forefathers." Zetzel (1996) 316 argues that the contrary-to-fact condition indicates that "Rome has violated justice; it could be, but is no longer, eternal." Even though Laelius is pessimistic about the current (and future) ability of Rome to rule justly, this statement still commits him to the theses that (1) eternality is possible in political affairs (a proposition that Laelius also seems to endorse at *Rep.* 3.33 = 3.34) and that (2) eternality can in fact be secured through a return to ancestral customs, which are in agreement with nature. However, so far as I can tell, Laelius nowhere offers an adequate argument for these theses.

⁸⁹ I follow Powell's OCT edition in accepting Mai's conjecture *sua[vitate]*.

no Stoic resonance. Indeed, as I shall argue in [Chapter 4](#), Scipio's treatment of the concept of political society owes more to Roman political and legal concepts than to any Greek theory of justice or law. The problem of how to face the attacks of the conventionalist by utilizing nature as a standard while also avoiding its corrosive effects is deferred to *De legibus*, where Cicero confronts it in his own name.⁹⁰

In the final analysis the dialogue pushes the reader to question the merits of Laelius' speech, and for that reason he should not be taken to be Cicero's mouthpiece. Not only did his speech gain no advantage over that of Philus, it ultimately brought him into contradiction with his earlier statements. It is perhaps not surprising, then, that it seems to have had little effect on the subsequent discussion. Ultimately, Laelius' argument does not demonstrate that Cicero identifies Rome's claims to empire with the injunctions of reason and nature. Rather, just the opposite. By drawing our attention to Laelius' spectacular failure, the dialogue demonstrates the difficulty of using nature and reason to justify the political and conventional.

A cooperative investigation

How then should we read *De republica*? How do we determine what Cicero is communicating through the dialogue? It is a helpful rule of interpretation to conceive of the dialogue as a cooperative investigation. Consistent with Cicero's purposes as expressed in the prefaces, it is so in two senses. On one hand, there is the cooperative, exploratory search after the keys for understanding political affairs by the characters within the dialogue. No single

⁹⁰ Because Cicero's character in *De legibus* also advocates the doctrine of Stoic natural law theory, scholars often take this as evidence that Laelius' view represents Cicero's and that both views suffer from the problems I have identified. In [Chapter 6](#), I argue that Cicero's character in *De legibus* manages these difficulties far more successfully than does Laelius. Thus, I am suggesting that Cicero decided not to provide a satisfactory solution to the issue in *De republica*, but rather raised the relevant problems and left their resolution for the sequel. While I think that the textual evidence points strongly in this direction (though the fragmentary state of *Rep.* 3 requires us to deal in probabilities rather than certainties), this view also has the virtue of freeing *De republica* and *De legibus* of substantial redundancies in their respective treatments of natural law.

speaker monopolizes all of the salient philosophical points. The overall philosophical picture gradually comes into focus through the contributions of multiple participants. On the other hand, there is the search after these same principles by the reader external to the dialogue. Because the dialogue does not present its teaching in such a way that the reader can readily assimilate it without careful attention to both the construction of the characters and the quality of their arguments, he or she is prompted to exercise his or her critical faculties to discover Cicero's message. Just as the characters within the dialogue philosophize, so the reader too may join them as he or she works through the text.⁹¹

Consider the debate between Philus and Laelius discussed above. If my reading of this exchange is correct, Cicero's purpose here is to get the reader to think more about the difficulties of applying natural law to any actual regime. The gap that emerges between the requirements of right reason and Roman rule is difficult to bridge. It seems that from the absolute perspective of reason commonwealths cannot function without injustice. A single participant could have made this point, but it instead emerges through the joint efforts of Laelius, Philus, and even Scipio.

The cooperative presentation of this teaching required a number of considerations on the part of the reader. In order to interpret the argument, I had to consider the relative strength of the arguments of both speakers. What would it require for Laelius to successfully establish his claims? Do the surviving arguments appear to have placed him in a position to do so? All this requires philosophical reflection.

Interpretation also involved considerations of a more literary nature. Why did Philus insist that he himself did not endorse his argument? What, if anything, should that indicate to the reader about the validity of his argument? Was Laelius, as the dialogue presented him, capable of providing a convincing response to Philus? What are we to make of the fact that while Laelius' attempt

⁹¹ For a modern conception of the dialogue as the collective search after truth, see Bakhtin (1984) 110. Cicero's *Republic*, however, does not appear to encourage Bakhtin's assumption that this understanding of dialogue entails the metaphysical position that identifies truth as the *activity* of searching rather than as something independent of the searchers.

to justify Rome's empire was very much in character with his role as the defender of the city, it also brought him into contradiction with earlier statements that were equally characteristic of him?

There was also the role of the intertextual reference to Plato's *Republic*. Was it significant that Laelius defended justice instead of Scipio, who seems more closely to approximate the role of Socrates in the dialogue? If so, how?

Finally, I had to reconcile this argument with the wider teaching of the dialogue. Does it square with what the dialogue had argued before? What is Cicero signifying by the absence of natural law from the ensuing discussion of justice and political society?

Only after reflecting on all of these various questions was it possible to determine what Cicero was saying in the dialogue; the dialogue form required nothing less. It turned out that assigning an argument to Cicero was itself a complex interpretive act that depended upon a range of philosophical and literary judgments. For this reason, in subsequent chapters I attribute arguments directly to Cicero only with great care. When I in fact do so, I am implicitly arguing that when all relevant factors are considered, the dialogue as a whole endorses the argument in question.

It is important to note that not every passage or section of the dialogue asks the reader to attend to as many or as complex questions as the debate between Laelius and Philus. Nor does the work everywhere display the same amount of internal cooperation. The almost entirely fragmentary fourth and fifth books may have featured a wide cast of characters: for instance, the jurist Manilius, largely silent in the first two books, appears to make a significant contribution to the discussion of the ideal statesman in Book 5. In contrast to the potentially wider participation in the conversation by the characters in Books 4 and 5, Scipio assumes the lead role throughout most of the first two books, as readers familiar with *De republica* are well aware. At one point Scipio himself worries that his lengthy contributions are on the verge of transforming him from a "fellow enquirer" into a lecturer and teacher, thus detracting from the cooperative nature of their investigation (*Rep.* 1.70). And in fact during these books most – though by no means all – of the dialogue's teaching may be gleaned from the words of Scipio.

But ultimately assessing the degree to which any section of the dialogue may be cooperative cannot simply be reduced to a mere counting of participating characters and the number of their contributions. Consider the conclusion of the dialogue, in which Scipio seems to have the last word.⁹² Here there are four speakers, but readers rarely pay attention to the fourth, who speaks only twenty-two Latin words. Except for these words, this final section of the dialogue consists of a conversation between Scipio, his father, and his grandfather. The conversation takes place high in the heavens in the context of a dream. What Scipio learns is shocking: he will either be murdered or save Rome as dictator; the glory of Rome is limited and ephemeral; and the immortal soul has both its origin and its destination in the stars. Like the myths that conclude Plato's *Gorgias*, *Phaedo*, and *Republic*, the conversation between the three men disorients the reader by offering a radical perspective on human affairs.⁹³

Nestled within such a perplexing finale, the brief contribution of the fourth speaker is easy to overlook. As soon as Scipio hears about his fate, Cicero the narrator breaks into the conversation: "Here when Laelius had called out and the rest had groaned forcibly, gently smiling, Scipio replied: 'Hush, please. Don't wake me from my sleep, but listen a little while longer to the rest of the dream'" (*Rep.* 6.16 = 6.12).

This is the only break in Scipio's narration of his dream and one of the many instances scattered throughout the surviving portions of the dialogue in which Cicero intrudes into the conversation of Scipio and his companions (see e.g., *Rep.* 1.17, 18, 34, 38; 2.1, 4, 28, 64; 3.34 = 3.42). Most of these interruptions are brief, usually limited to signifying a change in speaker. Here though Cicero is not introducing a change of speaker but providing the reader with information about the drama and action of the dialogue, as he did at *Rep.* 1.18, where he described the relationship between Scipio and Laelius, and at *Rep.* 3.34 = 3.42, where he related Scipio's

⁹² Some scholars have suggested that another paragraph may have followed Scipio's final words, which conclude the text as we now have it: "He departed; I awoke." To my mind this is unlikely. As Jonathan Powell asks (Rudd and Powell (1998) 198 n. 94), "What more could Laelius and the rest have said after this?"

⁹³ For the disorientating effect of the myths that conclude these Platonic dialogues, see Clay (2000) 165.

reaction to Laelius' treatment of natural law. Both of these previous occasions drew attention to an important consideration for interpreting the dialogue. So too here.

Cicero's narration draws our attention to the complexity of the literary frame of the dialogue between Scipio and his father and grandfather. The intergenerational conversation from 149 BC that concludes the book is being reproduced for participants internal to the dialogue by Scipio in 129 BC (the dramatic date of the dialogue), and that conversation in turn is reported by Cicero to readers outside of the dialogue. As a final twist, it turns out that Scipio has fallen asleep after the lengthy three-day conversation with his companions of the dialogue of 129 BC: he apparently is *dreaming* his dream from twenty years prior.

It is of particular importance that Scipio is dreaming as he relates the contents of his dream to his companions. At the outset of his dream, Scipio had provided a brief explanation of what he took to be its causes.

At this point Scipio Africanus showed himself to me. (In fact, I believe that the dream was produced by what we had discussed; for it is often the case that our thoughts and conversations produce in sleep something like that which Ennius wrote about Homer, about whom he obviously used to think and speak very often while awake). (*Rep.* 6.14 = 6.10)

If dreams are products of prior conversations, and Scipio is dreaming at the conclusion of *De republica*, then perhaps the contents of Scipio's dream were caused by the preceding political conversation? By interrupting Scipio's account to inform readers about what Scipio was doing while narrating his dream, Cicero performs one final action upon his readers. He invites those who have reached the dialogue's conclusion to return to its beginning, rereading and rethinking in order to discover the connection between this radical cosmic vision and Roman politics. In the next chapter we will accept this invitation.

CHAPTER 2

THE DREAM OF SCIPIO AND THE SCIENCE OF POLITICS

The best-known portion of Cicero's *Republic* is its conclusion.¹ Scipio Aemilianus shares with his interlocutors a dream in which he ascends to the celestial realms to converse with his father and grandfather. From his privileged position in the heavens he is able to observe the perfect harmony of the cosmos and the blessed dwelling that awaits the souls of those virtuous statesmen who have not succumbed to the allures of pleasure or power.

This so-called "Dream of Scipio" remains largely disassociated in the minds of students and scholars from the main arguments of the work which it concludes. There are at least two reasons for the separation of this passage from the rest of the text. The first regards the text's transmission. While the rest of the dialogue was lost until Mai's discovery and publication of the text, the Dream continued to be available thanks to the Neoplatonic commentator Macrobius. Consequently, for more than a millennium the Dream of Scipio was read and studied separately from the rest of the dialogue. Old habits die hard. The Dream continues to be published separately, and Latin students often find that their first introduction to this portion of *De republica* is to a work that seems to stand alone. The second reason concerns the general tenor of the two texts. While the cosmological picture of the Dream is ethereal and other-worldly, concerned with the eternal and transcendent, the political philosophy of the first five books seems to be firmly planted in this world, focusing on politics in historical Rome. The relationship between Scipio's Dream and the rest of the dialogue is not readily apparent. Read separately, it may be difficult to recognize that the Dream even belongs to the *Republic*. But of course both the political philosophy of Books 1–5 and the Dream

¹ Some of the material in this chapter first appeared in J. W. Atkins (2011).

belong to the same work. How, then, are they related? What does the Dream accomplish?

One possibility, of course, is that the Dream has no connection to the content of the rest of the dialogue. Such was the opinion of Hannah Arendt, who argued that, with the exception of Cicero's lamentation of the republic's demise in a fragment from the proem to Book 5, "nothing even in his *Republic* prepares us for the Dream of Scipio at the end."² In fact, the Dream "stand[s] in open contradiction to what Cicero, in common with other educated Romans, had always believed in *and* had expressed even in the same book."³ The Dream portrays philosophy as an escape from political life. Arendt concludes: "Here thinking means following a sequence of reasoning that will lift you to a view point outside the world of appearances as well as outside your own life. Philosophy is called upon to compensate for the frustrations of politics and, more generally, of life itself."⁴

Arendt overstates her case when she claims that nothing in the dialogical part of the work anticipates Scipio's dream. For instance, scholars have long recognized that parallels exist between the astronomical observations of Book 1 and the Dream of Scipio.⁵ More recently, Jonathan Powell has identified similarities between the Dream and Scipio's opening praise of philosophy in the first book.⁶ Even so, it is still possible that Arendt's view of the Dream is generally accurate. Perhaps the Dream does in fact contradict the *Republic's* central line of argumentation? Perhaps the dialogue's final word on the relationship between philosophy and politics does in the end signal that philosophical activity gets its start only when political action has failed?

I do not think that this is the case. In the following chapter, I attempt to show that the Dream not only follows naturally after, but also plays an important role in completing, the main line of argumentation in *De republica*. I defend two general claims. First, I argue that the science of astronomy frames the dialogue's entire

² Arendt (1978) 158. ³ Arendt (1978) 160; emphasis in original.

⁴ Arendt (1978) 160.

⁵ See e.g., Pohlenz (1931); Ruch (1948); and Gallagher (2001).

⁶ See Powell (1996).

investigation into the nature of politics. The dialogue raises the central question of whether it is possible to develop a scientific view of politics in an analogous manner to the natural science of astronomy. If astronomy serves as an important point of reference throughout the dialogue, it should come as no surprise that the work communicates its final lesson through a vision of the cosmos. However, second, and more importantly, I contend that the imagery in the *Dream* does some philosophical work for Cicero, providing him with the tools to complete a Platonic-inspired investigation into the nature of human beings and politics. In particular, the political science that Cicero commends based on his reading of Plato reveals the limits of reason in political affairs. At the heart of the dialogue lies a political psychology complemented by a cosmology that simultaneously prescribes rational rule while questioning the possibility of its realization.

Astronomy and politics

Whether or not *De republica* ends by suggesting that philosophy and politics are alternatives, this is certainly where it begins. In the opening preface Cicero argues for the importance of political involvement against philosophical opponents who promote abstention from politics on the ground that the life of political activity is both inferior to the philosophical life and burdensome for the philosopher. In the writings of his predecessors, the life devoted to politics and the life of philosophy were often portrayed as conflicting, perhaps even as mutually exclusive. Consider, for example, the reluctance of the philosopher to return to the cave in Plato's *Republic*,⁷ the opposition between philosophy and rhetoric in the *Gorgias*,⁸ and Aristotle's discussion of the primacy of the life devoted to theoretical contemplation in the *Nicomachean Ethics* 10.7–8.⁹ Despite the potential for tension and antagonism between

⁷ Pl. *Resp.* 7.519c–520e. ⁸ Pl. *Grg.* 484c–486c.

⁹ See also Sharples (1986) 32–3 and Boyancé (1970), who recommends that the controversy regarding the respective merits of the active and contemplative lives be placed within a wider debate among philosophers rather than narrowly construed as a broadside against Epicureans (185).

philosophy and politics, Cicero suggests in the preface that the two must be combined in some meaningful way if one is ever satisfactorily to investigate principles of civic affairs (*rationes civilium rerum*) – his reason for relating the conversation of the dialogue (*Rep.* 1.13). However confident the Cicero of the preface may be in bringing philosophy to bear on politics, the dialogical part of the work presents the relationship between philosophy and politics as a live and completely open question: the characters must determine, first, whether it is at all possible to apply philosophy to politics and, if so, what result this combination will yield.¹⁰

As we saw in the last chapter, the dialogical part of the work begins with a discussion of the respective merits and roles of politics and philosophy. Let's return to this opening conversation and take a closer look, this time considering not only the contributions of Laelius and Scipio but also those of Tubero and Philus. It will soon become clear that what is at issue is not just the relevance for politics of philosophy in general, but more particularly the relevance of the natural sciences, especially astronomy.

The first to arrive at Scipio's estate is his nephew Tubero, a young man whose eagerness for study is demonstrated by his early arrival for the conversation.¹¹ Unlike Scipio, the scholarly Tubero has no political obligations and can spend as much time as he likes in his books. Tubero embodies the life devoted to philosophical pursuits. This characterization is relatively consistent with what we know about the historical Tubero, who had enjoyed a lackluster political career but, as the dedicatee of works by the philosophers Panaetius and Hecaton, had serious interests in Stoicism.¹²

Tubero, staying true to character, immediately asks Scipio to give an explanation of the second sun recently seen at Rome. His uncle's initial response is to dismiss the question as irrelevant and unimportant, especially during a time of political turmoil. For support, he turns to Socrates, a witness that the Stoic Tubero should

¹⁰ Powell (1996) 27 n. 8 overlooks the fact that, while Cicero himself may never doubt that philosophy is useful for politics, the characters in the dialogue must debate the matter anew. Thus this tension is *not* resolved at the very outset. For discussion of Cicero's views in the introduction and the authorial detachment that results from the transition from the introduction to the dialogical part of the work, see [Chapter 1](#).

¹¹ See Barlow (1987) 360.

¹² For a brief biography, see Zetzel (1995) 10–11.

find compelling since his school claimed to be carrying on the Socratic tradition. In Scipio's estimation, Socrates wisely abandoned the investigation of celestial phenomena for ethics on the grounds that not only is it impossible for human beings to provide a complete account (*ratio*) of the subjects of natural philosophy, but, additionally, these studies have nothing to do with human life (*Rep.* 1.15). Tubero balks at this picture of Socrates. After all, Plato's dialogues provide the fullest source of information about Socrates, and they present a Socrates who often links virtues, morals, and even politics to the natural sciences. Scipio in response urges his nephew to distinguish between the historical Socrates and the Socrates of Plato's dialogues. He suggests that Plato himself is responsible for fusing Socratic interest in ethics with Pythagorean study of astronomy, numbers, and harmonies (*Rep.* 1.16).

This exchange between Scipio and Tubero is more than an abortive attempt to address what contemporary scholars refer to as the Socratic question. The portrait of a Plato who incorporated cosmological, mathematical, and astronomical ideas into Socratic-inspired discussions of ethics provides the first hint in the dialogue that natural science and human affairs may in fact be brought into a productive relationship. This passage also foreshadows the inspiration for the philosophical approach that informs the main line of enquiry in *De republica*. Scipio and the others will draw heavily on Plato as they too attempt to connect the study of the cosmos with the study of politics.

The conversation is interrupted by the arrival of first Philus and then Laelius. When informed of the topic of conversation between Scipio and Tubero, the politically minded Laelius promptly questions its relevance "to our homes and commonwealth" (*Rep.* 1.19). Philus, who like Cicero himself excels in the Academic practice of arguing both sides of an issue (*Rep.* 3.7 = 3.8), responds by attempting to show the relevance of astronomical questions. His first argument assumes the Stoic teaching that the universe is a city of gods and men in order to demonstrate that Laelius errs by too narrowly construing "commonwealth" and "home" to refer only to Rome. Because human beings are citizens of the universe, all phenomena are relevant, including heavenly phenomena (*Rep.* 1.19).

Laelius agrees to let the conversation continue since they are “on holiday.” But he hardly seems convinced. And with good reason. Philus has not explained what bearing this larger conception of a city has on Rome, the city as Laelius understands it. In particular, it is not clear what relevance the study of astronomy has for human life. What are the “many great things” (*Rep.* 1.19) that knowledge of the cosmos delivers?

With Laelius’ blessing Philus attempts to explain the recent sighting of the double sun. He begins by offering the example of Archimedes’ orrery, a mechanical model of the solar system, which was able to predict a solar eclipse.¹³

But this new type of globe (*sphaerae*), in which were contained the motions (*motus*) of the sun and moon and those five stars that are known as “planets” or, as it were, “wanderers” (*vagae*), was not able to be depicted on the earlier, solid globe (*sphaera solida*). The invention of Archimedes was all the more remarkable, since he had devised how a single revolution (*conversio*) could preserve unequal and diverse courses (*inaequabiles et varios cursus*) in their very different motions (*in dissimilimis motibus*). When Galus moved this globe, the result was that the moon followed the sun in that bronze sphere by as many revolutions (*conversionibus*) as it does by days in the sky itself. As a result, that same eclipse of the sun occurred in both the sky and globe. (*Rep.* 1.22)

While its significance for the central line of argumentation in the dialogue will soon become apparent, it is impossible to know for certain what Philus intended to demonstrate with this example since a break in the text immediately follows. The text resumes with Scipio describing how in the past political leaders such as Pericles utilized astronomy to liberate citizens from debilitating superstitious fear (*Rep.* 1.25). This example amounts to a retraction of his earlier opinion that the historical Socrates correctly rejected astronomy as “adding nothing at all to human life” (*Rep.* 1.15), as Tubero quickly points out (*Rep.* 1.26). At least in some limited, practical ways, scientific enquiry is relevant for politics.

But what is the relationship between scientific or philosophical enquiry and politics considered more broadly? In his next set of remarks, Scipio affirms the life of philosophy as supremely valuable, citing Archimedes’ invention of his orrery as precedent

¹³ See Zetzel (1999) 11 n. 32.

(*Rep.* 1.28). The scientific and philosophical perspective does have some bearing on political affairs after all; however, its role is primarily negative, revisionary, and critical. In a series of remarks that anticipates the imagery and even a few themes from the later Dream, Scipio suggests that the cosmic and divine perspective of philosophy and astronomy devalues the glory associated with politics, challenges common notions of property ownership, and elevates the life of philosophical contemplation above that of political service (*Rep.* 1.26–8). This early speech does seem to present philosophy roughly as Arendt reads the Dream – as an escape from, and wholly critical perspective on, politics. There is still no indication yet that scientific or philosophical knowledge can make a positive contribution to understanding political affairs.

Laelius, the spokesman for the city and the life devoted to politics,¹⁴ can remain silent no longer. He sees no relationship between science and politics and, what is more, vehemently objects to the suggestion that philosophical and scientific pursuits are the highest. He responds to Scipio's encomium of the natural sciences and philosophy with a parallel speech dismissing astronomy in general and Archimedes' orrery in particular as useless.¹⁵ Like Callicles, who similarly dismissed philosophy in Plato's *Gorgias*, Laelius believes that such studies only "stimulate" the minds of youths so that they can learn "greater things" – that is, politics – more easily (*Rep.* 1.30). He then helps to set the agenda for the rest of the dialogue by asking Scipio to discourse on politics (*Rep.* 1.34).

Even though Scipio and the other characters agree to discuss political affairs, it would be a mistake to assume that the subject of conversation indicates that scientific and philosophical concerns have been sidelined completely. The more scientifically oriented Philus, too, expresses enthusiasm for the topic of discussion, for he sees an opportunity to discover a "systematic account, almost a science" of politics (*Rep.* 1.37). It is only now that the agenda for the rest of the conversation is fully set. Will the participants be able to

¹⁴ See Chapter 1, pp. 36–42.

¹⁵ He reports approvingly how Sextus Aelius responded to Galus' studies of Archimedes' orrery by quoting from Ennius' *Iphigenia*: "What's the point of astronomers observing signs in the sky? / When a goat or scorpion or some other beast's name arises / no one looks at what is in front of one's feet; they scan the expanse of the heavens" (Cic. *Rep.* 1.30). For syntax, see Zetzel (1995) 121.

produce a scientific account of political affairs in spite of the difficulties accompanying the integration of philosophy and politics?

The task of crafting a political science falls at first to Scipio. This is appropriate. While the other characters so far have appeared to be devoted more completely either to politics or scientific inquiry, Scipio has demonstrated a dual allegiance. Although as a statesman with the pressure of political obligations he initially had dismissed the value of astronomy, his love of learning also had led him to praise philosophy, even though it meant devaluing politics. Now he must bring them together into a productive relationship.

Scipio begins his task by turning to the discussion of constitutional theory. Admittedly, its relationship to the previous discussion of astronomy is not readily apparent. However, as Robert Gallagher has demonstrated, upon closer inspection it becomes clear that Scipio has extended the imagery of the movements of planets in Archimedes' orrery to his political discussion, where he uses it metaphorically to describe the changes of constitutions.¹⁶ It is important to note this metaphorical use of astronomy and how Scipio skillfully employs it to bring the task before him into sharper focus.

Scipio argues that there are three simple types of constitutions classified according to whether the deliberative element (*consilium*) is with one, a few, or many (*Rep.* 1.41–2). However, these constitutions do not tend to remain stable. Each has a path (*iter*); it follows an orbit or course¹⁷ which takes it towards a neighboring evil: kingship to tyranny; aristocracy to oligarchy; and democracy to mob rule (*Rep.* 1.44). Scipio elaborates:

There are remarkable revolutions (*orbes*) and something like (*quasi*) cycles (*circuitus*) of changes and alterations in commonwealths; to recognize them is the business of a wise man (*sapientis*), and to foresee them as they are approaching, directing their course (*moderantem cursum*) and keeping it under his control while governing the commonwealth, is the part of some great citizen and nearly divine man. (*Rep.* 1.45)

Here Scipio applies to constitutional change the same terminology (*cursus*, *circuitus*) that Philus used to describe the movements of

¹⁶ Gallagher (2001).

¹⁷ *Iter* is later coupled with *cursus* at Cic. *Rep.* 2.30 to portray metaphorically the revolutions of constitutions.

the planets in the orrery. A little later, Scipio again uses astronomical language to describe the simple constitutions: “Those first forms are easily changed (*convertuntur*) into their opposite vices, so that from a king comes a tyrant, from an aristocracy comes a faction, and from a democracy comes a disorganized mob” (*Rep.* 1.69). Philus had also used *conversio*, “change” or “revolution,” to describe the revolutions of planets in the orrery, and James Zetzel points out in his note on this passage that it “is normally used in an astronomical context.”¹⁸ The noun or its verbal form, as Gallagher notes, is used throughout the *Dream* to represent the revolutions of planets and stars (*Rep.* 6.22 = 6.18; 6.23 = 6.19; 6.28 = 6.24) and throughout the first two books to describe the revolutions of the simple constitutions and their degenerate variants (*Rep.* 1.44, 68, 69; 2.47).¹⁹

By appropriating astronomical language to discuss constitutional theory, Scipio draws attention to the constant movements that appear to characterize both planets and constitutions. But of course planets have a constant motion which astronomers are able to predict with a great degree of precision and even emulate, as Archimedes had demonstrated. What about constitutions? Do they also follow predictable paths? If so, then the motions of constitutions, like those of planets, may admit of rational analysis; the reasons for their changes may be understood and their “courses” predicted.

Towards the end of Book 2, Scipio explains that exploring the possibility of such a scientific analysis of constitutions is the goal of their entire discussion.

Here then will turn (*vertetur*) the circle, whose natural motion and cycle (*motum atque circuitum*) you must learn to recognize from the beginning. For this is the summit of political wisdom (*civilis prudentiae*) to which our whole conversation (*oratio*) is devoted, namely, to see the courses (*itineria*) and swerves (*flexus*) of commonwealths so that when you know where each commonwealth (*res*) is heading, you may either hold it back or obstruct the movement beforehand. (*Rep.* 2.45)

Once again utilizing astronomical language to describe the motions of constitutions, Scipio suggests that an important part of their task is to discover the patterns of constitutional change.

¹⁸ Zetzel (1995) 156. ¹⁹ Gallagher (2001) 510–11.

What characterizes the movements of constitutions? What are the reasons for their changes and transformations? How can these movements be governed and controlled? To answer these questions, Scipio will need to craft a science of politics much as the Greeks have developed the science of astronomy.

Models

Central to Scipio's attempt to understand the principles of political affairs is his use of models. In this too there is an analogy to the science of astronomy. Just as Archimedes studied the planets by setting up a model, so Scipio decides to use a model to provide an account of political affairs. He takes as his model (*exemplum*) the Roman Republic (*Rep.* 1.70). What precisely, though, does Scipio mean by *exemplum*, which I have translated as "model"?

There have been numerous analyses of Scipio's claim to use the Roman Republic as a model, the most important of which is internal to the dialogue itself. Early in the second book, Laelius interrupts his friend's account to provide a somewhat lengthy commentary on Scipio's methodology.

We see ... that you have introduced a new means of investigation which exists nowhere in the books of the Greeks. For that most eminent man [Plato], whom nobody could surpass in writing, selected his own territory on which he could construct a state according to his own judgment (*arbitratu suo*). It may indeed be an admirable state, but it is out of harmony with human life and customs. The rest (*reli-qui*) wrote about the types (*de generibus*) and principles of states (*de rationibus civitatum*) without any model constitutional form (*exemplari formaque rei publicae*). It appears to me that you intend to do both: you have started out by preferring to attribute to others those things which you yourself discover rather than, as Socrates did in Plato's work, inventing it all yourself; and you assign to reason those things related to the location of the city that Romulus did by chance or out of necessity. Furthermore, your investigation does not proceed in a wandering discourse, but it is focused on a single commonwealth. Therefore, go on as you have begun; for I think I can anticipate a commonwealth coming to completion as you proceed through the remaining kings. (*Rep.* 2.21–2)

Laelius divides Greek treatments of political society into two classes. On one hand, there is Plato's *Republic*; on the other, all of the other treatments of the subject. He then breaks down each type of analysis according to whether it (a) uses a fixed model and (b) contains an

empirical element based on a study of actual states. Plato uses (a) a definite model; however, his analysis of political affairs contains no (b) analysis of the practices and customs of currently existing regimes. Alternatively “the rest” do not use (a) particular models at all; rather they (b) conduct empirically based studies of actual states, from which they derive the principles of political affairs. According to Laelius, Scipio’s own treatment of political society is novel because it combines (a) from Plato and (b) from “the rest.” Scipio attempts to provide an account of political affairs by using a fixed model like Plato and also by incorporating political principles derived from an empirical study of actual states.²⁰

Scipio, then, in Laelius’ opinion, is following Plato insofar as both use models. But what exactly does it mean to use a model like Plato? Laelius’ remarks suggest two further factors that must be taken into account in answering this question: a model’s purpose and the degree to which it can be imitated.

Consider first the purposes for which a model may be employed. One potential reason for adopting a model may be to provide a picture in order to illuminate political principles. Such principles may be easier to see and understand if they are combined with a political model, as Laelius suggests Scipio has done. And in fact, later in this same book Scipio states that he has decided to use the Roman Republic as a model to point out “as if by a rod” the causes underlying “each public good and evil” (*Rep.* 2.52). However, in addition to displaying something abstract more clearly, a model may also function as an ideal conceived as “a goal to aim at or a pattern to follow ... [which] may be capable of realisation to a greater or lesser degree.”²¹ Scipio indicates that he has this use of a model in mind when he stresses that the Roman Republic is “the best form of the state” (*optimus status civitatis*; *Rep.* 1.34, 70, 71). Even more so than other regimes with mixed constitutions such as Sparta (*Rep.* 2.42), Rome exemplifies principles of stable government, and therefore it provides a pattern for other states and

²⁰ My analysis of this passage roughly follows Pöschl (1936) 43–7.

²¹ Powell (2001) 23. Powell argues that Scipio never speaks of Rome as a model in this sense: the term *exemplum* is only used in the illustrative sense, i.e., as an example. Asmis (2005) 393 notes that the Latin word *exemplum* can mean either model or example and rightly suggests that Scipio speaks of Rome in both senses of the term.

legislators to follow.²² For Scipio, Rome turns out to be a model not only in the illustrative sense but also in the sense of a pattern to be followed.

The illustrative use of a model is not foreign to Plato's dialogues. After all, in Plato's *Republic* Socrates undertook the project of building a city in speech in order to illustrate more clearly the nature of justice and injustice.²³ However, it is the second way of using a model – as a pattern to follow or imitate – that has an especially Platonic ring.²⁴ Laelius' remarks further draw our attention to this, not only by the comparison of Scipio's use of Rome with Kallipolis, the ideal city of Plato's *Republic*, but also by the terminology that he uses to describe these models: *exemplari formaque rei publicae* (see below for translation). How should this be construed?

Like *status rei publicae/civitatis* ("condition of the commonwealth"), the participants consistently use *forma rei publicae/civitatis* to indicate what Plato and Aristotle mean by πολιτεία: a constitution or regime, that is, the arrangement of offices in a *polis*.²⁵ The term variously refers to several of the simple constitutions, including aristocracy (1.53), monarchy (2.43), and tyranny (2.51). In consequence of this common usage, *forma* almost certainly does not indicate a Platonic form as is sometimes suggested,²⁶ but rather is to be construed with *exemplari* as a hendiadys meaning "model constitutional form."²⁷ Given the preceding evidence, Laelius' *exemplari formaque rei publicae* surely is meant to evoke Socrates' suggestion that his city in speech provides a "model" (παράδειγμα) of a good city or regime (πολιτεία), which in turn serves as a pattern to follow.²⁸

²² See also Lieberg (1994) 14.

²³ See Pl. *Resp.* 2.368c–369b. Scipio cites Plato's *Republic* as his inspiration for using a model in the illustrative sense at *Rep.* 2.52. Plato also employs models (*paradeigmata*) in an illustrative or exemplary sense in his *Statesman*. For analysis, see Lane (1998) esp. 61–9, 83–97.

²⁴ For the classic study of models in Plato, see Goldschmidt (1947).

²⁵ Arist. *Pol.* 3.6.1278b8–10, 4.1.1289a15–18. Aristotle also defines a regime as the way of life of the city at *Politics* 4.11.1295a40–b1.

²⁶ See e.g., Pöschl (1936) 99–107. ²⁷ Here I follow Lieberg (1994) 15.

²⁸ See Pl. *Resp.* 5.472d–473b. See also Pl. *Leg.* 5.739d–e.

Not only has Laelius' commentary drawn attention to Scipio's two-fold use of a model and its Platonic precedent, but – perhaps even more clearly – it also raises the question of whether each model can be implemented or realized. According to Laelius, the gulf between customary human practices and the ideal regime of Plato's *Republic* makes Kallipolis highly unlikely to be implemented. For a man such as Laelius, who measures ideas according to the standard of political utility,²⁹ the remoteness of Socrates' ideal regime renders it irrelevant for matters of political philosophy. In this he is much like the practically minded Antonius of Cicero's earlier *De oratore*, who likewise dismissed the ideal regime of Plato's *Republic* as “out of harmony with everyday life and the customs of states.”³⁰ Whether Scipio shares this opinion remains to be seen.

What about the implementation of Scipio's own model? By taking historical Rome as his model, Scipio had claimed that his task would be “easier” than Socrates' (*Rep.* 2.3), who constantly had to confront concerns regarding the practicability of his ideal city.³¹ On one hand, Laelius agrees that Scipio's model *should* be more realizable than Plato's. It is natural to suppose that a methodology which incorporated principles derived from a more empirical study of politics (the methodology of “the rest”) would produce a more attainable kind of model. On the other hand, in his assessment of Scipio's methodology Laelius accuses his friend of attributing his own discoveries and inventions to Rome. In particular, in his treatment of Rome's foundation Scipio has ignored chance and necessity in order to provide a completely rational account of political developments. According to Laelius, the difference between Socrates and Scipio is that “Socrates is explicitly inventing a state, while Scipio ... claims to be giving a historical account while in fact inventing just as much as Socrates.”³² Thus, Laelius challenges Scipio to demonstrate that the comparison between his model and Plato's does not in the end amount to a distinction without a difference. Can he show why his model regime is more realizable than Plato's?

²⁹ See [Chapter 1](#), p. 36. ³⁰ Cic. *De or.* 1.224.

³¹ See Pl. *Resp.* 5.471c, 5.471e, 6.502c, 7.540d, 9.592a–b.

³² Zetzel (1995) 178.

Later in the second book, Scipio provides an account of his methodology, which, like Laelius' earlier remarks, draws a comparison to Plato's *Republic*.

[Plato] fashioned a city more to be prayed for than to be expected; it was as small as possible, not one that could exist, but one in which the principles of political affairs could be discerned. But if only I can do it, I will try to employ these same principles that he saw – not in the shadowy model (*imago*) of a city but in the largest commonwealth – so that I should appear to touch the cause of each public good and evil as if with a rod. (*Rep.* 2.52)

Scipio agrees with Laelius about the implementation of Plato's *Republic*. Its realization is not likely; indeed, in Scipio's judgment Kallipolis could not exist. But unlike Laelius, Scipio is not willing to grant that this makes it irrelevant for political philosophy. On the contrary, Plato's *Republic* illuminates the important political principles that Scipio plans to incorporate into his own more attainable model. Moreover, even though Scipio claims that the city of Plato's *Republic* cannot exist, he does grant that it is the model city that one should pray for. Though Scipio describes his Roman model as "best," it turns out more precisely to represent the best practicable regime. Plato's model retains the title of the best conceivable regime. That Scipio views Plato's *Republic* more positively than Laelius does is not surprising; in fact, this difference is emphasized later in the dialogue in the fragments of Book 4 when Laelius points out that his friend is very hesitant to combat Plato even when they may seem to disagree (*Rep.* 4.2a = 4.4). Scipio seems to have a respect for Plato's political philosophy that Laelius lacks.³³

What principle or principles has Scipio gleaned from Plato's *Republic*? Scipio's remarks at *Rep.* 2.52 suggest that the principle derived from Plato will have three features: (1) it will be applicable to multiple cases; (2) it will be found after *Rep.* 2.52; and (3) it will be illustrated by developments in Roman history.³⁴ Only one principle in the extant text fits these criteria. It is found

³³ Another Book 4 fragment suggests that Plato be dismissed from the Roman Republic just as he had dismissed Homer from his *Republic*. However, we can discern neither the speaker nor context of the statement from the surviving text (*Cic. Rep.* 4.19 = 4.5).

³⁴ See J. W. Atkins (2013).

just a few paragraphs later. After examining the revolution of the plebs in 493 BC, Scipio makes the following observation: "the very nature of political affairs often overcomes reason" (*Rep.* 2.57). According to Scipio, the development of the Roman constitution encompasses irrationality, disorder, and contingency, thereby illustrating the general rule that political affairs do not yield to reason. Thus, from Scipio's point of view Laelius' earlier assessment is incorrect: he does in fact recognize the limits of reason in political affairs, and, furthermore, his account of Rome will demonstrate these limits. It is presumably for this reason that his own model is practicable, while Kallipolis, which is designed to have "everything in order according to reason,"³⁵ is not.

Scipio's remarks here raise questions about both his own use of models and Plato's *Republic*. In particular, how does Scipio demonstrate the limits of reason in politics? This is perhaps the most important question of the dialogue. But before we can answer this, we must first think further about the function of the model regime of Plato's *Republic*.

Plato's ideal regimes: the *Republic* and *Laws*

Scipio's claim that Plato's *Republic* demonstrated the principle that political affairs do not follow reason introduces a puzzle: how does a work that portrays a perfectly rational regime which ignores the limits of rationality in politics nevertheless teach that the essential nature of politics encompasses irrationality?³⁶ How is it that Rome, the model of the best practicable regime, can exhibit the same principles as Plato's *Republic*, the best conceivable regime? How is it possible for these two types of ideal models to be complementary, as Scipio seems to suggest, rather than mutually exclusive, as Laelius would have it? In order to answer these questions, it is necessary to consider briefly the relationship between these two types of models in Greek political philosophy.

It is sometimes suggested that Scipio's presentation of a model which represents a realizable or attainable ideal marks a departure

³⁵ Pl. *Resp.* 6.500c.

³⁶ For this question, see Nicgorski (1991) 236.

from Greek political philosophy in general and Plato's thought in particular.³⁷ However, Greek political philosophers carefully distinguished between different types of ideals and models. Indeed, Scipio's juxtaposition of Rome, a realizable model, with the ideal regime of Plato's *Republic*, a spectacular though unrealizable model, calls to mind the distinction suggested by Aristotle in *Politics* Book 4. Aristotle distinguishes the simply best regime from the best realizable regime and suggests that one goes wrong if one's political theory fails to take into account the latter.³⁸

However, Aristotle was not the first to distinguish between the ideal regime *simpliciter* and the ideal regime given prevailing conditions, i.e., the best realizable or practicable regime. Plato himself makes this distinction by means of the very dialogues that inspired *De republica* and *De legibus*. When the *Republic* and the *Laws* are read together as complementary, which is how Cicero approached these two Platonic works (*Leg.* 1.15, 2.14), it becomes clear that although both works portray ideal models, the two models represent different kinds of ideals and different types of models.³⁹ The ideal model city of the *Republic* is the best city conceivable. The ideal city of the *Laws*, simultaneously taking into account prevailing conditions and keeping "as close as possible"⁴⁰ to the ideal of the *Republic*, "portrays a practical realization of that model."⁴¹

A gap exists between the ideal of the *Republic* and its manifestation in the *Laws*, caused in part by the shift from the perspective of the divine to the human.⁴² This is an important notion for Plato. Whereas the ideal city of the *Republic* is the best city possible, the ideal city of the *Laws* is the best possible for human beings; that is to say, it is the best possible given the conditions imposed upon it by human nature. From the point of view of the *Laws*, the ideal of the *Republic* is fit for divine men who, submitting to the rule of reason and the good, embrace the rule of philosopher-kings and the communality of property. It is a 'city inhabited by gods and children

³⁷ See e.g., Powell (2001) 23 and Fott (2009) 152–3.

³⁸ Arist. *Pol.* 4.1.1288b21–1289a5.

³⁹ For the relationship between Plato's *Republic* and *Laws*, see Laks (1990) and Laks (2000).

⁴⁰ Pl. *Leg.* 5.739e. ⁴¹ Laks (2000) 267. ⁴² Laks (2000) 275–8.

of gods.’⁴³ Inasmuch as this is true, the *Republic* “has ignored the facts of human nature, and simultaneously overestimated the power of the rational part while underestimating that of the irrational part.”⁴⁴ In one of the *Laws*’ few purple passages, human beings are compared to marionettes controlled not only by the brittle, golden, divine thread of reason but also by the strong iron thread of irrational impulses.⁴⁵ There is something divine and rational in human beings, it is true, but it is equally true that we are controlled by something irrational and bestial. The *Laws* suggests that psychological harmony, which characterizes just human beings according to Socrates in the *Republic*, is extremely difficult to attain.⁴⁶ Given this picture of human nature, the regime of the *Laws* – with its mixed constitution, the institutions of the family and private property ownership for all citizens, and the conspicuous absence of the philosophical rule of the philosopher-king – must pass as a close enough approximation to stable, just, and rational rule.

However, while the ideal city of the *Laws* represents the implementation or practical manifestation of the model city in the *Republic*, it is important to recognize that the second-best regime itself serves as a model and ideal. It is not to be understood as a blueprint for political reform.⁴⁷ Magnesia presents a model to be imitated even though it differs from that of the *Republic*. Since it takes into account what is possible for human beings, the model of the *Laws* represents the best practicable city.

In sum, on Plato’s own account the relationship between the *Republic* and *Laws* seems on the whole to be broadly complementary rather than developmentalist: the changes introduced to the model regime of the *Laws* represent the revision, implementation, and completion of the ideal found in the *Republic* rather than its rejection. The regime of the *Republic* contributes something fundamental to an understanding of political affairs even though, due to the constraints of human nature, it is not possible for it to be implemented without revision. In particular, Plato is able to draw our attention to human irrationality and the limits of reason

⁴³ Pl. *Leg.* 5.739d.

⁴⁴ Laks (2000) 276. ⁴⁵ Pl. *Leg.* 1.644d–645c.

⁴⁶ Socrates presents this view of justice at Pl. *Resp.* 4.443d–e.

⁴⁷ See e.g., Stalley (1983) 88–95 and Brunt (1993) 245–6.

by juxtaposing the ideal of rational, just, and stable rule of the *Republic* with the best practicable regime of the *Laws*. In this way, the best conceivable regime of the *Republic* not only provides a pattern of ideal rule but also teaches an important lesson about the implementation of such rule.

The preceding account broadly represents the sort of relationship between the best conceivable regime and best practicable regime required by Scipio's earlier remarks. That it does so has interesting implications for understanding how Cicero believed Plato's *Republic* and *Laws* were related, a more complicated question than it may at first appear.⁴⁸ But more importantly, it is crucial for understanding the political philosophy of *De republica*. By forcing us to reflect on the relationship between the model regimes in Plato's works, Cicero prepares the ground for his own use of models to illustrate the Platonic teaching concerning rationality and politics.

The cosmos and the limits of reason

Thus far, in tracing Cicero's concern with models, we have been focusing on the relationship between the best conceivable regime of Plato's *Republic* and the best practicable regime represented by the second-best city of the *Laws* and by historical Rome of *De republica*. But Rome is not the only model in Cicero's *Republic*. Towards the end of Book 2, Scipio makes one final statement about his use of models:

But as for my use of our state as a model (*quod autem exemplo nostrae civitatis usus sum*), its purpose was not to define the best regime – for I could have done that without a model (*sine exemplo*) – but to illustrate from the actual deeds of the greatest state what I was establishing in my systematic discourse. But if you are looking for the very type of ideal regime without any particular people as a model (*sine ullius populi exemplo*), then we must use the model of nature (*naturae imagine*). (*Rep.* 2.66)

What is the model given by nature that establishes the principles that Scipio was exploring by means of historical Rome?⁴⁹ As one

⁴⁸ I explore this question in J. W. Atkins (2013).

⁴⁹ Powell (2001) 28–9 insists that *exemplum* in this passage must be translated “example”; and indeed, the illustrative use of a model appears to be chiefly in view here. However,

commentator points out, “the ‘image given by nature’ is almost certainly the cosmos itself.”⁵⁰ More specifically, it points towards the cosmic order of the Dream of Scipio, which supplies an ideal model of order, divinity, and rationality. Like its Platonic counterparts, this model is both illustrative and a pattern to be imitated.⁵¹ Above all, it throws into sharp relief the irrationality and disorder that mar human political affairs. Scipio uses his analysis of historical Rome to further illustrate, and to provide a remedy for, these conditions. Thus, *De republica* contains both a model of the best conceivable political order and one of the best practicable order: what Plato accomplishes in two dialogues, Cicero combines into one. The rest of this section develops this argument, focusing mainly on the function of the cosmic order. The Roman constitution will receive a more detailed treatment in [Chapter 3](#).

Let us begin by briefly establishing a wide-angle view from which we may narrow our focus. The plot and theory of *De republica* are driven by at least five pairs of contraries, almost all of which are most spectacularly displayed in the Dream. The first of these is the tension between political practice and scientific and philosophical enquiry. As we have seen, this matter led to the discussion of the relevance of astronomy for politics and to the important question of whether a scientific account of politics was possible. This tension reappears in the Dream as Scipio’s attention is twice diverted to earth and Rome, despite the unsurpassed beauty, glory, and splendor of the cosmos and importance of its lessons (*Rep.* 6.21 = 6.17; 6.24 = 6.20).⁵² The second pair appears throughout much of the discussion of constitutional theory as

the fact that Scipio can offer to substitute the “model (*imago*) of nature” for the *exemplum* of Rome indicates that a model in the sense of a standard to be imitated remains relevant. After all, Scipio had just used the word *imago* to describe the ideal regime of Plato’s *Republic* at *Rep.* 2.52. For the Platonic resonance of *imago* in Cicero, see further note 51.

⁵⁰ Zetzel (1999) 55 n. 80.

⁵¹ In fact, both words translated as “model” at *Rep.* 2.66 – *exemplum* and *imago* – are found at *De officiis* 3.69, a passage in which Cicero uses Platonic metaphors to portray natural law as a model to be imitated. Based on the strength of this parallel, one might conjecture that the “model of nature” at *Rep.* 2.66 refers to Laelius’ discussion of natural law in Book 3 rather than to the cosmic order of Book 6. However, as we saw in [Chapter 1](#), Scipio does not appear to endorse Laelius’ argument. For the text and additional discussion of Cic. *Off.* 3.69, see [Chapter 6](#), pp. 219–21.

⁵² This is also the major theme of the preface to Book 3, where Cicero, writing in his own voice, praises the participants in the dialogue for adding knowledge acquired by study

Scipio is challenged to navigate between a general account of political affairs and Rome as a particular illustration of these affairs and model of the best practicable regime (*Rep.* 1.64, 71; 2.21–2, 64).⁵³ The final three were raised to varying degrees by the references to Plato's *Republic* in the second book: the best conceivable ideal and the best possible given prevailing circumstances, the rational and the irrational, and the divine and the human. These last three pairs are also exemplified in the Dream and are crucial for understanding the search for a scientific account of politics. In the Dream, the ideal, the divine, and the rational are all represented by the cosmos, while the non-ideal, the human, and the irrational are all represented by the earth.⁵⁴

The key passage occurs when Scipio Africanus vividly describes to his grandson the heavenly courses of the planets, which in turn constitute the ideal of perfect order that follows rational principles.

And as I continued looking, Africanus asked: "Please tell me how long your mind will be fixed on the ground? Do you not notice the lofty realms into which you have come? As you see, all things are connected together by nine circles (*orbibus*) or rather spheres (*globis*). One of these, the outer one, is the heavenly sphere which encompasses all the others. It is the highest god himself, controlling and holding in place the rest. In this outer sphere are fixed the eternally revolving courses of the stars (*stellarum cursus sempiterni*). Below this are the seven which revolve (*versantur*) backwards, in the opposite direction (*contrario motu*) from the heavens. Of these, the first sphere belongs to that star which on earth they call Saturn's; then comes the light promoting prosperity and health for the human race, which is called Jupiter's; then the one that is red and terrifying to those on earth, which you call Mars'; below these, the region more or less in the center belongs to the Sun, the ruler (*dux*), leader (*princeps*), and guide (*moderator*) of the rest of the lights. It is the mind (*mens*) and balanced organization (*temperatio*) of the universe, of such great size that it goes around and fills all else with its light. Two orbits (*cursus*) follow it like attendants – the first belongs to Venus and the second to Mercury. In the lowest sphere the Moon revolves (*convertitur*), kindled by the rays of the Sun. Below this, however, nothing exists that is not mortal (*mortale*) and perishable (*caducum*), except the souls given to the human race by the gift of the gods. Above the Moon all

to that given by nature and political experience (*Rep.* 3.5 = 3.5). For the importance of this pair of contraries, see Sharples (1986) 32–5.

⁵³ For this contrary, see Zetzel (1999) xix, xxiii.

⁵⁴ For the ideal and non-ideal, see Cic. *Rep.* 6.21 = 6.17 and 6.27 = 6.23; for the rational and irrational, see *Rep.* 6.22–3 = 6.18–19; and for the human and divine, see *Rep.* 6.30 = 6.26.

things are eternal (*aeterna*). But that sphere which is in the middle and ninth, Earth, does not move. It is the lowest, and onto it all weights are carried by gravitation.” (6.21 = 6.17)

This ideal heavenly order turns out to be a picture of the ideal political order. Just as Scipio’s portrayal of the cycle of constitutions evoked the orbits of the heavenly beings, so Africanus’ depiction of the cosmos here in turn suggests politics. Words such as *cursus* (“orbits”), *temperatio* (“balanced organization”), and *convertitur* (“revolves”) were earlier used to describe the movements and conditions of constitutions (*Rep.* 1.44, 68, 69; 2.30, 47).⁵⁵ Africanus’ description of the sun as *dux* (“ruler”), *princeps* (“leader”), and *moderator* (“guide”) is political and mirrors the words which Scipio had used earlier in the dialogue to describe his ideal statesman: the guide of the commonwealth or *rector rei publicae*.⁵⁶ So Zetzel comments: “The sun’s role in the universe is analogous to that of the *rector rei publicae* in the state; in particular, *temperatio* reflects the balance of the ideal government.”⁵⁷ As the ideal statesman is the guide (*moderator*) of the commonwealth (*Rep.* 5.2 = 5.8), so the sun in the heavenly order is “the guide of the rest of the lights” (*moderator luminum reliquorum*). Cicero’s desire to make this point may very well be the reason that he opted for the Chaldaean ordering of the planets, which places the sun closer to the middle than the Platonic ordering.⁵⁸

This model political order exhibits perfect rationality. The sun rules in the manner of a god; Africanus calls it the “highest god” in the passage reproduced above, and earlier at *Rep.* 6.17 = 6.13, it is described as the chief ruler (*princeps*) whose example earthly rulers (*rectores et conservatores*) are to emulate. The sun’s rule exhibits the perfect balance (*temperatio*) and guidance necessary for an eternally stable regime. Such balance is achieved because the different orbits of the planets are calculated proportionally and according to reason (*pro rata parte ratione*; *Rep.* 6.22 = 6.18). The result is a perfectly rational order whose harmony (*concentus*)

⁵⁵ For use of *temperatio* for “moderation” or “balanced organization,” see Cic. *Leg.* 2.16; 3.12, 17, 27, 28. I owe this observation to Gallagher (2001) 514.

⁵⁶ See Zetzel (1995) 237–8. ⁵⁷ See Zetzel (1995) 238.

⁵⁸ For Cicero’s deviation from Plato, see Boyancé (1936) 59–65 and Zetzel (1995) 236–7.

is reflected in the perfectly orchestrated music that it produces (*Rep.* 6.22 = 6.18). Because this order makes no accommodation to human weakness or need, human rulers have at best “imitated” it (*imitati*; *Rep.* 6.22 = 6.18). Human beings as they are presently constituted cannot ever completely grasp this order: “Indeed, so great is the sound caused by the very swift revolution of the entire heavenly realm that the ears of human beings are unable to perceive it, just as you are unable to gaze directly at the sun: your sight and sense are overcome by its rays” (*Rep.* 6.23 = 6.19).

I have suggested that Cicero intends the cosmic picture in the Dream to represent the sort of ideal model of rational consistency that Plato sought in the *Republic*. The metaphor of the sun provides additional evidence that the *Republic* is in view. The incapacity of sight before the sun used to describe the difficulty that human beings have in comprehending the ideal heavenly order is almost certainly an allusion to the Platonic image of the cave.⁵⁹ And just as Plato’s philosophers have to return to the cave and political rule and attempt to put into effect their philosophical training,⁶⁰ so Scipio learns from his grandfather that human statesmen (*rectores et conservatores*) “have journeyed” from the heavenly realm to earth where they must try to imitate the rule of the sun on earth before returning to heaven (*Rep.* 6.17 = 6.13). The Dream is modeled on the philosopher’s ascent from, and subsequent descent to, the cave in Book 7 of Plato’s *Republic* as well as the Myth of Er in Book 10.⁶¹

Although statesmen have the duty to replicate the ideal of heavenly rule on earth, they encounter circumstances that make it impossible for them to fulfill their mandate. Let’s return to Africanus’ description of the cosmic order at *Rep.* 6.21 = 6.17. In contrast to the rational, regular, and eternal order of the planets held firmly in their own orbits by the sun, Africanus presents the sublunar world. On earth, there is nothing that is immortal or immutable. Everything is prone to decay, flux, and change – with the single important exception of the soul, which was a divine

⁵⁹ See Pl. *Resp.* 7.515c–516a. ⁶⁰ See Pl. *Resp.* 7.539e–540a.

⁶¹ Commentators pay little attention to Cicero’s use of *Republic* 7 as a model for the Dream; but see Altman (2009) 420–1. See also the discussion below.

gift. Consequently, Africanus provides a cosmological explanation for the seemingly constant movements of the various simple constitutions described by Scipio earlier in the dialogue. Like practically everything else beneath the moon, constitutions suffer change and decay. This of course suggests a difference between the orbits of planets and constitutions. While it is a property of planets to be in motion and they follow a rational, predictable course held in place by the sun, constitutions are set in motion because of conditions that are less than ideal or orderly. Hence the motions of constitutions may not always follow rational patterns. As Scipio had observed earlier in the dialogue: "The same form of commonwealth (*idem rei publicae modus*) is never held for long" (*Rep.* 1.68). The very order of the cosmos suggests that human affairs, including forms of political organization, are inherently unstable and in flux. Scipio's Dream suggests that cosmology and astronomy are no longer mere metaphors for political science, but directly guide the statesman as he seeks to understand political behavior. Moreover, it is becoming clear that political science can never be as exact as the natural science of astronomy.

However, the flux of the sublunar world is also manifested in humans by irrationality; it is open to a psychological as well as a cosmological explanation. Insofar as this is true, an understanding of human psychology will yield political principles, which will in turn enable the statesman to achieve a greater degree of political stability in a world of unrelenting change (*Rep.* 2.45). Scipio returns to human psychology constantly throughout his discussion in the first two books. In particular, he is interested in that aspect of human psychology that separates human beings from gods and the human order from the divine order: the presence of irrationality alongside rationality. For now, two passages in particular concern us: Scipio's treatment of monarchy in Book 1 (*Rep.* 1.56–64) and the metaphor of the elephant and trainer at the end of Book 2 (*Rep.* 2.67).

Scipio's lengthy argument for monarchy in Book 1 has troubled many readers. Why does he argue the case for monarchy with such apparent conviction and at such length? Partway through the discussion, Laelius asks Scipio to produce an argument for monarchy rather than relying on witnesses and historical examples. Scipio

obliges and engages in some dialectic. When asked whether he willingly allows anger to dominate his mind when he is being provoked to anger, Laelius answers that he indeed does not, but tries to follow the example of Archytas of Tarentum – a prominent Pythagorean mathematician, a noted politician, and a contemporary of Plato. Scipio responds:

Very good! ... Therefore Archytas rightly supposed that anger clearly at variance with reason (*dissidentem a ratione*) is a type of revolt (*seditionem*) in the mind, and he wanted it to be brought to an end (*sedari*) by wise judgment (*consilio*). To anger add avarice, add the desire for command (*imperii*) and glory, add inordinate desires; and then see this: if there is any royal command (*imperium*) in human minds, it will be the absolute rule (*dominatum*) of a single element, namely wisdom (*consili*) – for it is the best part of the mind. And when wisdom rules absolutely (*consilio ... dominante*), there is no place for inordinate desire, anger, or temerity. (*Rep.* 1.60)

Scipio's answer contains several words with political resonance. Words such as "revolt" (*seditio*), "wisdom" or "wise judgment" (*consilium*), "command" (*imperium*), and "absolute rule" (*dominatus*) connect psychology and politics. Just as the multiple constituents of the irrational part of the soul should submit to the rule of reason, so in politics the many should submit to the one wise monarch. Monarchy so conceived represents the rule of the wisest and most virtuous person. Such rule is required by reason and to rebel against reason is sedition. Monarchy entails *imperium*, the efficacy of reason to govern in its pure and undiluted form.⁶² As such, it corresponds to the ideal of philosophical rule exercised by the philosopher-kings of Plato's *Republic*. It also represents the ideal rule portrayed in the Dream of Scipio, where the sun, the "leader" and "guide" of the heavens, exercises absolute rule over the planets in accordance to reason. Thus, Scipio's treatment of monarchy provides Cicero with an opportunity to explore the *ideal* of complete rational control in which the statesman controls himself and the state according to perfect rationality, just as the sun controls the planets.⁶³

⁶² At *Leg.* 3.3–5 Cicero's character similarly uses monarchy to represent the rule of the "most just and wise men" according to right reason. Like Scipio he argues that the *imperium* of the monarch consists of the efficacy of right reason to govern.

⁶³ Hence I do not see the lengthy treatment of monarchy as a problem, as does Zetzel (1995) 19. A. Michel (1965) 237–61, esp. 251 n. 5 rightly observes that the treatment of

But is the rule of reason and the wise practicable? Given the cosmology of the Dream, which draws a sharp distinction between the conditions of earth and the supralunar heavenly realm, it is clear that the earthly monarch will be incapable of duplicating the stability of his heavenly counterpart. Scipio explicitly supports this conclusion as he compares the advantages of the Roman constitution with monarchies. The downfall of monarchy lies precisely in its inability to maintain itself against the forces of change (*Rep.* 2.43).

The impracticability of the absolute rule of reason receives further emphasis during Scipio's discussion of Rome in Book 2. This becomes especially clear towards the end of the book as he addresses the challenge confronting the ideal statesman (*prudens*), whom Scipio compares to an elephant trainer (*Rep.* 2.67). Of the two, the mahout has the easier task. Although his elephant is huge, it is single, "docile, and familiar with human customs." On the other hand, within the human soul reason "governs and masters not a single beast or one easy to tame, and it rarely is able to accomplish the task." Scipio clearly is using the picture of a multitude of beasts within the human soul to indicate the human passions. Indeed, many editors place fragments containing a catalogue of passions immediately after this metaphor.⁶⁴ His point is that the human soul contains a complex and powerful mix of passions, and it is a constant struggle to get human beings to obey reason.

The image of the mahout explains why rational control is so difficult. While the mahout has only to control a single animal, the human soul is complex and therefore harder to bring into order. As a result, this passage shows that Scipio could not have thought practicable the psychological model of complete rational control underlying his argument for kingship. There he pointed out that reason must control "innumerable" passions (*Rep.* 1.60), which he now claims is "rarely" possible. Thus, the image of the

monarchy represents an ideal, although he does not notice that Scipio explores the ideal of reason or rational control. Cumming (1969) 1:211–13 recognizes the importance of the argument for rational control, but does not notice that it is an ideal. Hence he finds too great a tension between the "argument for rational control" and the argument for the mixed constitution.

⁶⁴ See Ziegler (1969); Bréguet (1980); and Zetzel (1999).

elephant and trainer anticipates the teaching of the cosmology of the Dream: rational control must remain an ideal, and one unsuited for the present human condition at that. It also brings into focus for the first time the difficulty of the statesman's task. He must first bring order to his own soul, which requires his constant attention, and then attempt to produce order among his fellow citizens, all of whom possess souls that "rarely" follow reason.

Scipio's presentation thus far has demonstrated that it is vital for any investigation into politics to recognize the constraints placed on the statesman by the irrationality inherent in human beings and human affairs. Indeed, somewhat paradoxically, recognizing that political affairs are neither completely open to rational analysis nor subject to complete rational control turns out to be the key to providing the sought-after scientific account of political affairs.⁶⁵ This of course is the principle that Scipio gleaned from Plato and promised could be seen in both the Roman and cosmic models.

Given the limitations of rational rule, what remedies are available for the statesman as he seeks to maintain a stable political order? The dialogue suggests two. The first of these is the mixed constitution. According to Scipio, the regime that blends wise judgment (*consilium*) with liberty (*libertas*) best accounts for the general rule that political affairs do not yield completely to reason and is best equipped to forestall revolution (*Rep.* 2.57). Such a regime most closely approximates the stable and balanced rule of the ideal heavenly order. Discussion of the reasons for this must be deferred to the next chapter, where the mixed constitution will occupy our attention.

Despite the stability of the mixed constitution relative to the simple regimes, both the cosmological and psychological teachings of the dialogue suggest that the mixed regimes too will inevitably end. Such arrangements are subject to the conditions of flux, change, and decay that characterize the sublunar world.⁶⁶ However, the dialogue suggests that there is a second resource available to the statesman as he tries to maintain an enduring political order. And unlike the mixed constitution, it is eternal and not subject to change and decay. It is his soul.

⁶⁵ Nicgorski (1991) 235–6. ⁶⁶ See also Gallagher (2001) 516.

The statesman and the lessons of Scipio's Dream

In order to understand the nature of the statesman's soul and how he can employ it to counteract flux and establish a stable political order, we must first understand the role of the statesman. Scholars have spent much time discussing the director of the commonwealth (*rector rei publicae*). Some scholars writing in the early twentieth century supposed that Cicero had established a constitutional position to be filled by a single individual; they even went so far as to identify which of Cicero's contemporaries was meant to take the job.⁶⁷ Opposing this view, Richard Heinze suggested that Cicero meant to identify a class of good statesmen rather than a single person or position.⁶⁸ Recent scholars have endorsed Heinze's view, which on balance is the more likely position.⁶⁹ In the debate far more attention has been given to the relationship between the director (*rector*) and the contemporary politics of the 50s BC than to the philosophical role that this statesman is given within the dialogue. It is precisely this important philosophical role that I wish to explore.

Scipio introduces his statesman as the opposite of Tarquinius Superbus, the historical example of a tyrant:

Let there be opposed to this tyrant another figure: a man who is good, wise (*sapiens*), and experienced with respect to civic advantage and prestige – a man who is, as it were, a guardian (*tutor*) and manager (*procurator*) of the *res publica*; for this should be the designation for whoever is the director (*rector*) and helmsman (*gubernator*) of the state. Make sure that you recognize this man, for it is he who is able to guard (*tueri*) the state by his wisdom (*consilio*) and labors. (*Rep.* 2.51)

As more than one scholar has indicated, the terms used to describe the statesman – “guardian” (*tutor*) and “manager” (*procurator*) – correspond to Plato's description of the philosopher-king in his *Republic*.⁷⁰ Just as Plato had contrasted the tyrant with the just man,⁷¹ so Scipio juxtaposes the tyrant with his model statesman

⁶⁷ Reitzenstein (1917) 481–6 suggested Augustus; Meyer (1919) 189 put forward Pompey.

⁶⁸ See Heinze (1924) esp. 84–7.

⁶⁹ See Powell (1994) and Asmis (2005) 410.

⁷⁰ See Pöschl (1936) 117 and Asmis (2005) 409.

⁷¹ See Pl. *Resp.* 9.576d, 9.580b–c, 9.588a–592b.

(*Rep.* 2.51). This ruler (*rector*) and guardian (*tutor*) is wise (*sapiens*) and prudent (*prudens*; *Rep.* 2.67), just as Plato's guardian (φύλαξ) and ruler (ἄρχων)⁷² is a lover of wisdom and prudent (φρόνιμος).⁷³ And, like Plato's guardians, his rule is to be characterized by reason. He is apparently a member of that class of rulers and guardians (*rectores et conservatores*) who, as we noted earlier, descended from heaven to rule on earth (*Rep.* 6.17 = 6.13).

Thus far Scipio's description of the model statesman owes much to Plato's *Republic*. However, there is a difference with regard to the implementation of his rule. Scipio's statesman must deal with the difficult conditions, explored in the previous section, which make psychic and social harmony on earth so unlikely. Much like Plato's *Laws*, the dialogue gives much attention to the conditions that make implementation of rational rule difficult. And in fact, of Plato's works it is the *Laws* that is more important for understanding the task of the statesman.

As noted earlier, psychic harmony in the *Laws* is difficult both to attain and maintain. The problem of psychic harmony in human beings leads to a corresponding problem of social harmony for the statesman. How is he to achieve cooperation and harmony among the disparate elements which make up society?⁷⁴ The short answer is persuasion. Glenn Morrow notes: "The problem of the statesman is essentially a problem of bringing about order and cooperation among his human materials and he will succeed, Plato tells us repeatedly in the *Laws*, only if he uses persuasion."⁷⁵

Persuasion suggests rhetoric. Now Plato was highly critical of the democratic rhetoric of his day, which he dismissed as mere flattery that did nothing to improve the souls of one's audience. He did, however, think there was a correct use of rhetoric. In the *Phaedrus* Socrates provides two conditions which the orator must meet: (1) he must know nature⁷⁶ and (2) he must know the souls of

⁷² Pl. *Resp.* 9.591a. ⁷³ Pl. *Resp.* 9.590d. ⁷⁴ See Pl. *Leg.* 3.693d–e.

⁷⁵ Morrow (1965) 437.

⁷⁶ At *Phaedrus* 270a Socrates suggests that enquiry into natural phenomena (φύσεως περί) provides for the "high-mindedness" (τὸ ὑψηλόνου) and "effectiveness in all aspects" (πάντη τελεσιουργόν) requisite for an effective orator. Scholarly opinion is divided about whether "the nature of the whole" (τῆς τοῦ ὅλου φύσεως), which Socrates says is necessary for understanding the "nature of the soul" (ψυχῆς φύσιν) at 270c, refers to the cosmos. However, his mention of Anaxagoras as an impetus for such study suggests

his hearers.⁷⁷ In using intelligence to persuade necessity to bring about political harmony, the legislator of the *Laws* fulfills the *Phaedrus*' conditions for the orator. He knows his human materials, as the psychological analysis metaphorically represented by the image of the human marionette in *Laws* I demonstrates;⁷⁸ and he knows the nature of the cosmos and the good, which he derives from studying the revolutions of the cosmos, since the world-soul that controls the cosmos is supremely good.⁷⁹ The motions of the stars should be studied because they "must always move around some middle point ... and must have in every way the greatest possible kinship and likeness to the revolution of intelligence (νοῦς)."⁸⁰

For Cicero too there is a close correlation between psychic harmony and dissonance and societal harmony and dissonance. He recognizes that history is driven as much by the irrational as by the rational (*Rep.* 2.57). Because the statesman (*prudens*) understands the powerful pull of the emotions, he also understands the difficulty of getting society to cohere. Just as the mahout rules the elephant by persuading him to turn in the appropriate direction, so the statesman must use his intimate knowledge of the human soul to persuade the constituent orders of the state to obey reason (*Rep.* 2.67).

Talk of persuasion suggests rhetoric for Cicero just as it did for Plato. Just as the orator in the *Phaedrus* and the legislator in the *Laws* were required to know (1) the principles of order in the cosmos and (2) human psychology, so in the *Orator* the ideal orator will possess knowledge of ethics and physics in addition to dialectic.⁸¹ Likewise in the encomium of philosophy at the end of *De legibus* I, Marcus explains that the wise statesman (*prudens*) will have knowledge of human nature and ethics (*Leg.* 1.60), knowledge of the nature of the universe (*natura rerum*) and physics (*Leg.* 1.61), and knowledge of rhetoric – the *ars loquendi* (*Leg.* 1.62). Returning to *De republica*, by the conclusion of the second

that Socrates does have cosmology in mind here. For bibliography on the issue, see Waterfield (2002) 102.

⁷⁷ See Pl. *Phdr.* 270a–272e. ⁷⁸ See Pl. *Leg.* 1.644d–645c.

⁷⁹ See Pl. *Leg.* 10.898c. ⁸⁰ Pl. *Leg.* 10.898a.

⁸¹ See Cic. *Orat.* 14–17; cf. Cic. *De or.* 1.68.

book Scipio has already made it clear what knowledge the statesman must obtain about (2), the human soul, a lesson demonstrated by the psychological analysis of monarchy and the image of the mahout and elephant. However, in the first five books of the dialogue he does not adequately explain (1), what knowledge the statesman can derive from the cosmos. This is the main purpose of the Dream of Scipio.

The statesman can learn several lessons from the Dream's cosmic vision. The first of these lessons has been our chief concern throughout the last section. With its presentation of the completely rational cosmic order, the Dream provides a model of the absolutely just political order. In doing so it clearly indicates the gap that exists between this ideal regime and all human regimes, laying bare the limits of reason in political affairs.

The next lessons for the statesman come into clearer focus when one recognizes that the Dream is inspired by Plato's treatment of the images of the cave and sun in *Republic* Book 7 in addition to the Myth of Er, as I pointed out in the previous section. Once the philosopher has escaped from the cave and has seen the world by the light of the sun, he finds that he has acquired a very different perspective on politics: the honors and praise that motivate other men he now holds in little regard.⁸² Similarly, when Scipio places Rome and politics in the context of the brilliance and expansiveness of the cosmos, he discovers that glory – a central component of the traditional Roman honor code – is first devalued, and then revalued.⁸³ From the cosmic vantage point, Rome, the mighty and eternal city, appears as only a small point in space and time – her achievements noted briefly by only a small portion of human beings and then soon lost in the endless torrent of passing human generations (*Rep.* 6.24–9 = 6.20–5). In light of this, “what fame can you attain from men's speech, or what glory (*gloriam*) can you attain that is worth pursuing?” (*Rep.* 6.24 = 6.20). Instead of placing his “hope in human rewards (*in praemiis humanis spem*),” “virtue herself by her own enticements should draw you towards

⁸² Pl. *Resp.* 7.516c–d. Riches are revalued at 7.521a.

⁸³ For the status of *gloria* as a key element in the Roman honor code, see A. A. Long (1995), who shows that the revaluation of glory is central to Cicero's project in his later work *De officiis*.

true glory (*verum decus*)" (*Rep.* 6.29 = 6.25). Scipio learns that the statesman is not to be motivated by the same desire for glory as other politicians.

While the Dream mirrors Plato's *Republic* Book 7 in its revaluation of traditional political values, there is a distinct contrast between the philosopher's reticence to return to the cave and Scipio's willingness to return to Rome and to his political duty. In Plato's *Republic* the philosopher notoriously has no desire to descend to the cave; he must be compelled by necessity to return to political rule.⁸⁴ By contrast, despite the dizzying brilliance of the cosmos, Scipio finds himself nevertheless drawn to Rome: his grandfather twice notes that he is gazing at the earth (*Rep.* 6.21 = 6.17, 6.24 = 6.20). It appears that Scipio will rule willingly, and he will do so even after hearing that he might have to suffer and die on behalf of his fatherland (*Rep.* 6.16 = 6.12). It is true that upon seeing his father for the first time Scipio asks why he must remain on earth, and is told that to care for his family and fatherland – and to do so justly – is a god-given duty (*Rep.* 6.19–20 = 6.15–16). However, in the subsequent conversation Scipio's grandfather has to go to great efforts to loosen Rome's hold on his grandson, suggesting that for Scipio any sense of duty complements a deep-seated affection for his fatherland. In the Dream, Scipio appears no longer to embrace the view that political rule is to be undertaken strictly out of necessity – a position which he had aired earlier in the dialogue (*Rep.* 1.27).⁸⁵

If the statesman is going to rule, he will encounter difficulties, as even the allusion to Scipio's impending death in the Dream suggests. The statesman needs hope (*spes*), not in the fleeting and fickle promises of fame and glory as typically understood, but in something more stable (*Rep.* 6.29 = 6.25). The Dream provides this. It contains a protreptic element, calling the statesman to greater service. After all, the glory of the heavenly realm to which good statesmen will return provides a great incentive to statesmen

⁸⁴ Cf. Pl. *Resp.* 7.519d–520e.

⁸⁵ Cf. Cic. *Off.* 1.28. In this passage Cicero explicitly criticizes Plato's teaching that the just philosopher will descend to rule because of necessity. True justice, he argues, is only compatible with a free act.

who struggle on earth to achieve stability and order in their own souls and in the *res publica* (*Rep.* 6.30 = 6.26).

The final lesson of the Dream – and indeed, the final lesson of the dialogue – is the one that most immediately has to do with the ability of the statesman to overcome the inevitable flux and change of everything below the moon, including regimes.

As we have seen, through education and persuasion, the statesman must get the political order to approximate the ideal order in the heavens. In a passage at the end of Book 2 (*Rep.* 2.69), Scipio presents a picture of the harmony that results when the statesman is successful. In this splendid passage, he suggests that the duty of the statesman consists in contemplating himself and summoning others to imitate him so that “by the splendor of his soul and life he might present himself as a mirror to his fellow citizens.” The harmony that exists in the statesman’s soul is also to exist in the state. The statesman uses reason (*ratio*) to guide the disparate orders of the commonwealth into a just, harmonious, and rational order. When he is successful,

through the regulation of reason (*moderata ratione*) the state sings harmoniously in the agreement (*consensu*) of very different groups; for what is called harmony by musicians with respect to choral music is called concord (*concordia*) in the state – the tightest and best bond of security in every commonwealth. And this concord cannot exist at all without justice.

The imagery used to describe the perfectly balanced mixed constitution evokes both the cosmic order of the Dream and the ideal state of Plato’s *Republic*. In the Dream, the sun rules the other planets by reason, and this ideal order produces a perfect and unsurpassable harmony (*Rep.* 6.22 = 6.18). In Plato’s *Republic*, Socrates had defined justice as psychic and political harmony by using a musical analogy at the end of Book 4 (443d–e) in his exploration of the ideal city, which Scipio believed could not be realized. In both of these instances, there is no hint of discordance and instability.

And so too in Scipio’s remarks at *Rep.* 2.69. There is no trace here of the problems of psychic and political discord, the limits of reason, or the failure of rational control that had plagued Scipio earlier in the dialogue. Because of the ideal statesman, the rational

control and perfect harmony that exist in the heavenly order presented in the Dream are replicated *on earth*, which we had previously been led to believe was impossible. The flux of the sublunar world is controlled by the reason in the soul of the statesman.

Nowhere in the dialogue do either the participants within or the reader without discover how this feat is possible until the conclusion of the Dream of Scipio. Here Scipio learns that *not everything* beneath the moon is mortal and passing away: his soul (*mens*) is divine and eternal (*Rep.* 6.30 = 6.26).⁸⁶ It is the director (*regit*) and guide (*moderatur*) of his body just as he is the director and guide of the state, the eternal god is the director (*rector*) and guide (*moderator*) of the cosmos, and the sun is the director and guide of the heavens.⁸⁷ Consequently, the proof of the immortality of the soul that is taken from the *Phaedrus* (245c–246a) to conclude the dialogue (*Rep.* 6.31–2 = 6.27–8) is much more than a literary touch. It enables Cicero to introduce the divine, rational, and eternal – in short the ideal – into a world that must otherwise yield before the forces of flux and degeneration.

Central to Cicero's *Republic*, then, is an exploration of the extent to which one can develop a science of politics as the Greeks have developed the natural sciences. Cicero points out, through the investigation of Scipio and his companions, that scientific precision in politics is impossible given human nature, psychology, and the natural processes of degeneration and decay. Over against these forces with which politics must deal, the cosmos portrayed in the Dream of Scipio is the model of divine, rational, and ideal harmony of which the constitution of Rome is the empirical realization. The Dream provides the vision of the good to which the wise statesman must look, even if he knows it will never be realized.

⁸⁶ Boyancé (1936) 124–5 finds a likely source of inspiration in Plato's *Laws* 10.899b, a passage that likewise teaches about the divinity of the soul in a cosmological context.

⁸⁷ See Boyancé (1936) 141 and Gallagher (2001) 516.

CHAPTER 3

CONSTITUTIONAL CHANGE AND THE MIXED CONSTITUTION

In the previous chapter, we tracked Cicero's exploration of the science of politics. The *Republic* entertained the ideal of rational rule only to question its practicability. Political science turned out to lack the precision of natural science. A purely rational account of politics proved to be impossible. These broader insights into political science provide the backdrop against which Cicero entertains the central question of classical political theory: what is the best regime (*Rep.* 1.45–6)? Given the impossibility of implementing rational rule, the best regime turns out to be the best practicable regime. As to the identity of this regime, Scipio, the leader of the discussion of the first two books of the *Republic*, leaves no doubt. It is the regime with a constitution composed of a mixture of democratic, aristocratic, and monarchical elements and principles (*Rep.* 1.45, 69). In Scipio's opinion, Rome exemplifies the mixed constitution better than Sparta, Carthage, or any other actual regime (*Rep.* 2.42, 66).

Cicero was not the first to analyze Rome in terms of the theory of the mixed constitution. This distinction belongs to the Greek historian Polybius. Born around 200 BC in the southern Greek city of Megalopolis, Polybius was later taken as a hostage to Rome, where he was able to meet members of leading families and to observe the Roman regime first hand. His time at Rome inspired him to write his *Histories*, which attempted “to discover by what means and by what type of regime almost the entire inhabited world was conquered and in less than fifty-three years brought under the single rule of the Romans, an achievement which is without historical precedent.”¹ In the work's sixth book, Polybius sets forth a cyclical account of constitutional change and discusses the function and design of the mixed constitution. His star historical

¹ Polyb. 1.1.5.

examples of such constitutions are the Spartan and Roman regimes. Polybius' arguments in *Histories* 6 would influence many later political thinkers, including Machiavelli, Montesquieu, and John Adams. But the first to engage extensively with Polybius on the subject was Cicero.

In this chapter I read Cicero's account of constitutional change and the mixed constitution alongside Polybius'. The comparison is natural. Not only do these works provide extensive analyses of Rome in terms of the concept of the mixed constitution, but, as we shall see, Cicero's *Republic* constantly draws the reader's attention to Polybius' prior account. Underlying Polybius' theory is a competing science of politics that assumes a different view of human nature and takes a different stance towards chance and historical contingency. As Scipio unfolds his own account of constitutional change and the mixed constitution, he also offers a critique of Polybius' political science. In the process Cicero illuminates the theoretical underpinnings of the deceptively simple concept of the mixed regime. He unveils two very different conceptions of the mixed regime based on two mutually exclusive approaches to the science of politics.

The Platonic-Aristotelian framework

Polybius of course was not the first to discuss the concept of the mixed constitution. Some 250 years earlier, the Greek historian Thucydides had suggested that better than either democracy (rule by the many) or oligarchy (rule by the few) was "a moderate blending of the few and the many."² However, Thucydides' treatment of the concept is brief; he does not present it as part of a wider approach to constitutional theory that was in turn based on theoretical foundations. For this, we must turn to Plato and his student Aristotle.

Plato dealt with questions of constitutional theory in his *Republic*, *Statesman*, and *Laws*, though it is only in the last of these that he introduces a form of the mixed constitution into the

² Thuc. 8.97.2.

discussion. His wide-ranging and multifaceted discussions in these works are not easily or quickly summarized. However, we can identify several principles central to his general approach to constitutional theory. They would later be further developed and elaborated upon by Aristotle. Taken together, these principles constitute a rough framework according to which constitutional questions may be examined. This framework lies at the center of Cicero's disagreement with Polybius.

The following principles encapsulate what I shall call the Platonic-Aristotelian framework:

- (1) One should identify the perfectly just regime, that is, the just regime provided that ideal conditions obtain. Even though it may not come into being, the best regime provides a model of which other regimes are approximations and with a view towards which other regimes should be constructed.³
- (2) The ideal conditions necessary for the realization of the ideal regime will come about by chance or fortune, if at all.⁴ Concessions must therefore be made to these non-ideal conditions.⁵
- (3) Human nature is plastic and human affairs are unstable.⁶ As a consequence of this, Plato concludes that (a) it is impossible for any one type of legislation to work for all and (b) it is impossible to develop a "science" capable of producing "any simple rule for everything and all times."⁷ From Plato's (a), Aristotle draws the following conclusion: many different regimes with different laws will have to be constructed in order to fit the regime to the people who comprise it.⁸ He also applies Plato's (b) to the realm of constitutional change, suggesting there is no single pattern of constitutional change.⁹
- (4) Conflict is dangerous and counterproductive. "Civic harmony" or "likemindedness" (*homonoia*) should be sought; "faction"

³ See Pl. *Leg.* 5.739a–e; Pl. *Plt.* 293c–e, 302c; Arist. *Pol.* 4.1.1288b21–1289a7, 4.2.1289a26–b26.

⁴ See Pl. *Resp.* 7.540d, 9.592a; Pl. *Leg.* 4.710c–d; Arist. *Pol.* 7.4.1325b33–1326a5, 7.13.1331b39–1332a36.

⁵ See Pl. *Leg.* 5.746a–c, 9.858a–c. ⁶ See Pl. *Leg.* 4.709a–b; Pl. *Plt.* 294b.

⁷ Pl. *Plt.* 294b. ⁸ Arist. *Pol.* 4.1.1289a7–25.

⁹ Arist. *Pol.* 5.12.1316a1–b27.

or “civic conflict” (*stasis*) must be eliminated.¹⁰ Given non-ideal conditions and the Platonic-Aristotelian view of human nature, some version of a mixed constitution is most just and so will minimize *stasis*.¹¹

Although Plato and Aristotle agreed that civic conflict could be eliminated and harmony secured by a mixed regime, their recipes for the appropriate mixture differed. Plato suggested that endowing the constitution with the characteristics of monarchy and democracy produces freedom, friendship, and intelligence in the city.¹² Aristotle criticized Plato’s mixture of democratic and monarchical principles,¹³ and suggested that the best practical alternative for most Greek states was the polity, a mixture of oligarchy and democracy.¹⁴ By making room in the constitution for principles of freedom and wealth, respectively the predominant values of the many and the few, as well as for both numerical equality and equality according to merit, the mixed constitution limits *stasis* and revolution.¹⁵ Given non-ideal conditions, Aristotle adds, failure to adapt the constitution in such a manner is an injustice and will lead to *stasis* and revolution.¹⁶

Before turning to Polybius and Cicero, it may be helpful to see what the constitutional theory of one who rejects this framework might look like. Niccolò Machiavelli, the sixteenth-century Florentine political thinker, furnishes us with such an example. Although he entertains the notion of the mixed regime, Machiavelli rejects the Platonic-Aristotelian framework wholesale; at the very least, he explicitly rejects each of the four principles that I have identified.

First, Machiavelli is not concerned with the nature of the just regime under ideal conditions. He “depart[s] from the orders

¹⁰ For the importance of *homonoia* in Greek constitutional thought, with special attention given to the thought of Plato and Aristotle, see Hahm (2009).

¹¹ For the mixed constitution in Plato’s *Laws*, see *Leg.* 3.693c–e, 3.694b, 3.701d. Aristotle places particular emphasis on the *mixing* of elements in the mixed constitution at *Pol.* 2.6.1265b33–1266a5, 2.12.1273b32–1274a21, 4.7.1293b1–4.8.1294a25. See further Lintott (2002) 165–6.

¹² *Pl. Leg.* 3.693d–e. ¹³ *Arist. Pol.* 2.6.1264b26–1266a30.

¹⁴ *Arist. Pol.* 4.8.1293b33–1294a29.

¹⁵ *Arist. Pol.* 4.9.1294a30–b41, 5.1.1301a19–1302a15.

¹⁶ *Arist. Pol.* 5.2.1302a16–b5.

of others” by going “directly to the effectual truth of the thing [rather] than to the imagination of it.” As he explains: “And many have imagined republics and principalities that have never been seen or known to exist in truth; for it is so far from how one lives to how one should live that he who lets go of what is done for what should be done learns his ruin rather than his preservation.”¹⁷

Second, Plato and Aristotle recognized that chance plays a role in what kind of regime is appropriate: concessions must be made to the character or nature that a given people *happens* to possess. Machiavelli rejects this as well. He compares fortune to a great flood and a capricious woman: in either case, the vigorous man (the man with *virtù*) is perfectly capable of taking control.¹⁸ Fortune must be met with bold resistance rather than cautious accommodation.

Third, Machiavelli rejects the plasticity and instability of human nature.¹⁹ Human nature is no longer a “marvel” (θαῦμα) comprised of an imprecise mixture of passions and reason, as Plato had supposed.²⁰ Instead human beings are invariably motivated by rational self-interest.²¹ This view of human psychology led Machiavelli to develop a science of man. As the editors of the Oxford Edition of Machiavelli’s *Discourses* explain: “If human nature is fundamentally that evil state which has been fixed since the Fall of Man, the actions of mankind are also predictable and repetitious like the nature these actions reflect.”²²

Finally, Machiavelli rejects the view that failure to fit the regime to the character of a given people is an injustice that will lead to *stasis* and revolution. The end of the regime is no longer justice, but security.²³ This security can be achieved by constructing a regime based on Machiavelli’s insight into human psychology. Given that people invariably act according to their own selfish interests, security can be achieved by structuring the regime in

¹⁷ Machiavelli, *The Prince*, Ch. 15 (trans. Mansfield).

¹⁸ See Machiavelli, *The Prince*, Ch. 25.

¹⁹ See Machiavelli, *Discourses on Livy*, 1.39.

²⁰ See Pl. *Leg.* 1.644d–e. ²¹ See Skinner (1978) 1:185–6.

²² Bondanella and Bondanella in the introduction to Machiavelli, *Discourses on Livy*, xviii.

²³ See Skinner (1978) 1:123 and Mansfield (1996) 238.

such a way that the interests of various segments of society check one another. Such engineering produces a dynamic equilibrium that secures stability and security.²⁴ Civic discord is no longer to be discouraged, but is in fact defended.²⁵ Indeed, it was the Roman mixed constitution's ability to put discord to work that brought the Republic to perfection.²⁶

Machiavelli's rejection of this fourth and final principle and his alternative conception of the mixed constitution follow from his prior rejection of the first three principles. It is the interdependence of the four principles that allows us to conclude that Machiavelli is advancing a new framework or system of thought over against the Platonic-Aristotelian framework. Machiavelli commends the mixed constitution in the *Discourses* on completely different grounds than Plato and Aristotle.²⁷

Polybius' alternative

It is widely accepted among Machiavelli scholars that *Discourses* I.2 was inspired by Book 6 of Polybius' *Histories*. How the Greekless Machiavelli was able to gain access to the contents of a text that supposedly had not yet been translated into Latin or Italian poses something of a mystery.²⁸ Nevertheless, the parallels are too numerous to be accidental. Machiavelli paraphrases several passages from Polybius. He translates *Histories* 6.7–8 almost verbatim. However, do the similarities extend to their respective principles of constitutional theory? Did Polybius anticipate the broader framework within which Machiavelli approaches the question of the mixed constitution? Did he precede Machiavelli in rejecting the Platonic-Aristotelian framework in favor of an

²⁴ See Machiavelli, *Discourses on Livy*, 1.2–8.

²⁵ See Skinner (1978) 1:181. ²⁶ See Machiavelli, *Discourses on Livy*, 1.2.

²⁷ My elaboration of the Platonic-Aristotelian framework and its Machiavellian alternative utilizes multiple texts from both Plato and Machiavelli. The relationship between Plato's *Republic*, *Statesman*, and *Laws* has been a topic of much scholarly debate. The same is true for Machiavelli's *Prince* and *Discourses*. In both cases, viewpoints that stress the fundamental unity of the author's political thought have recently gained traction. However, in neither case is there scholarly consensus. My own schema fits well with, but in my view does not necessarily presuppose, strict unitarian readings of these authors.

²⁸ For this problem and an attractive if somewhat speculative solution, see Hexter (1956).

alternative account of the mixed constitution based on an alternative science of politics? It is time to take a close look at Polybius' discussion in *Histories* 6.

As I mentioned earlier, Polybius' analysis in Book 6 is comprised of two main components: the cycle of simple constitutions and the mixed constitution that can impede the cycle. Let's look at them each in turn.

Polybius' discussion of simple constitutions occurs in two parts. He begins his account with a summary sketch of the argument (6.3–4) and follows it with a longer analysis of the causes of change (6.5–9). In the sketch, Polybius divides the simple constitutions into three pairs according to the number of rulers and whether the rule is virtuous or vicious: kingship and tyranny, aristocracy and oligarchy, democracy and mob-rule.²⁹ These six follow after a seventh – a primitive monarchy that arises unaided and naturally.³⁰ Polybius famously maintained that these seven constitutions occur in order, the last of which prepares the way for the recurrence of the first. This *anakuklōsis* or cycle is directed by “nature's principles of government, according to which a constitution changes, is transformed, and comes back again into its original state.”³¹

With slight modifications, Polybius' seven forms of constitution match up well with the seven forms given in Plato's *Statesman* at 302c. There is, however, one crucial difference. Polybius has replaced the kingly rule of Plato's ideal statesman with the primitive monarch, whose title to rule is not the possession of knowledge or virtue but brute strength – or so Polybius explains in the “likely” (εἰκός) account that follows.³²

The substitution of the primitive monarch for Plato's ideal statesman provides a subtle though striking hint that Polybius rejects the first principle of the Platonic-Aristotelian framework – the concern with justice given ideal conditions. Polybius supplements this initial hint with an explicit statement to this effect at the end of the preliminary sketch of his account. The theory of constitutions and change, he writes, has been set out more precisely “by Plato and certain other philosophers.”³³ However, in contradistinction to

²⁹ Polyb. 6.4.1–10.

³⁰ Polyb. 6.4.7.

³¹ Polyb. 6.9.10.

³² See Polyb. 6.5.7.

³³ Polyb. 6.5.1.

these philosophers, Polybius is interested in “pragmatic history” (τὴν πραγματικὴν ἱστορίαν), an important term which Kurt von Fritz glosses as “realistic” and in opposition to the ideal regimes of Plato and Aristotle.³⁴ Polybius, like Machiavelli, is interested in human beings and affairs as they are – not as they could be. This gloss finds support later in Book 6, when Polybius dismisses Plato’s ideal regime and refuses to admit it to the discussion “until it presents its own actual deeds.”³⁵ Polybius no less than Machiavelli rejects Platonic and Aristotelian considerations of the best regime given ideal conditions and instead considers the *verità effettuale della cosa* – “the effectual truth of the matter” – to borrow Machiavelli’s words from Chapter 15 of *The Prince*.

With the relevance of the just regime under ideal conditions ruled out of court, Polybius – again like Machiavelli – does not have to trouble himself over making concessions to whatever the character of the people for whom he is legislating happens to be – the second principle of the Platonic-Aristotelian framework. For Polybius, human nature is a subject matter for science, to be investigated and understood rather than, as for Plato and Aristotle, a complex and variegated force to be accommodated but not mastered. Accordingly, Polybius moves on to a restatement and analysis of the cycle of constitutions, where he provides an account of human nature that is far more uniform and transparent than Plato and Aristotle would allow.

Polybius’ account of constitutional change in general, and constitutional degeneration in particular, rests on an understanding of basic human psychology.³⁶ Human beings are rationally self-interested creatures. An individual’s natural tendency to self-aggrandizement will only be restrained if there is an experience of hardship or suffering sufficient to cause him to enter “fear of reciprocal harm” into his utilitarian calculation when deciding

³⁴ von Fritz (1954) 51. Walbank (1972) 66–96 suggests that “pragmatic history” for Polybius is research that privileges observation and political experience above all.

³⁵ Polyb. 6.47.8. Polybius’ critique of Plato’s ideal regime was anticipated by Plato himself in the beginning of the *Timaeus* (19b–c), where Socrates gives similar reasons for being disappointed with the regime of the *Republic*. I owe this observation to Cumming (1969) 1:89–90.

³⁶ See Pédech (1964) 204–29 and, more recently, Hahm (1995).

both public and private policy.³⁷ When such experience is lacking because of comfortable and secure conditions, a good form of constitution will soon invariably decline into its degenerative form. Polybius has borrowed simple moral psychology from the Sophists/Epicureans to explain the Platonic principle that everything, constitutions included, naturally degenerates into its opposite condition.³⁸ The unPlatonic psychology leads him to the unPlatonic and anti-Aristotelian conclusion that constitutional degeneration can be predicted with almost exact precision.³⁹

Thus far, Polybius' attempt to draw on human psychology to render history predictable sounds much like the political science commended by Machiavelli. However, we must be careful. As Harry Jaffa rightly cautions, this apparent similarity may be undermined if Polybius turns out to hold a Platonic view of fortune (τύχη), namely, that the realization of the best regime depends on chance. In such an instance, chance would constrain one's ability to scientifically engineer a regime according to completely rational principles. Jaffa himself does not doubt that Polybius accepts Plato's basic stance towards fortune. As a result, "Polybius ... like Cicero and like Plato himself in the *Laws*, attempted to find such an approximation to the goals of the *Republic* as fortune and circumstances permitted. The mixed constitution was only the best of possible approximations."⁴⁰

However, chance cannot be operating in Polybius' analysis of constitutions as it did for Plato or, for that matter, for Aristotle. For Plato and Aristotle chance determines what kind of regime will be appropriate. Conditions suitable for the ideal regime will be realized by chance. Human nature is variegated, complex, and manifests itself differently in different peoples. Hence, the type of practically preferred regime approximating the ideal regime that is chosen by the legislator will also be determined in part by chance, that is, by whatever the character of the people to whom it is fitted

³⁷ See Polyb. 6.6.4–6.

³⁸ See Polyb. 6.10.2–5 and Pl. *Resp.* 8.563d–564a. For the Epicurean account of the connection between social security, calculation, and commitment to the common advantage of a community, see Schofield (2000) 438–40.

³⁹ See Polyb. 6.4.12, 6.10.12, 6.57.3–4; cf. Arist. *Pol.* 5.12.1316a1–b27.

⁴⁰ Jaffa (1956) 518.

happens to be.⁴¹ Polybius, as we have seen, has rejected the relevance of the concept of ideal constitutions. Hence, he does not have to wait for chance to bring about the conditions suitable for the ideal constitution. Moreover, he has substituted the complex and multiform view of human nature of Plato and Aristotle with a simple analysis that takes human nature to be much more uniform, stable, and – consequently – predictable. Polybius' project, which assumes a uniform view of human nature from which to derive a socio-psychological law that facilitates future prediction, directly opposes the Stranger's conclusion in Plato's *Statesman*: "For the dissimilarities of human beings and of their actions, and the fact, if I may say so, that nothing related to human affairs ever remains at rest, prohibit any science (τέχνην) whatsoever from producing any simple (ἅπλοῦν) rule for everything and for all times."⁴²

Polybius' different view of human nature marks a fundamental difference in approach. The statesman following Polybian principles need not alter his approach according to the particular character of the populace, itself determined by factors beyond his control, that is, by fortune. The openness of human nature to such precise analysis makes superfluous the talk of ideals and concessions due to the opacity and variability of this nature. Thus, for the Athenian Stranger in Plato's *Laws*, chance (τύχη), "intertwined with nearly all human affairs", is one of the great determining factors in setting up a regime or crafting legislation.⁴³ However, it plays no such determinative role in Polybius' analysis.

Fortune, of course, is still a vital concept for Polybius; indeed, the ultimate test for a regime is how well it can bear reversals of fortune.⁴⁴ But however great an obstacle to other endeavors fortune may be, it is no longer an obstacle to understanding human nature with a scientific exactitude. Polybius stresses just this fact with his repeated use of "nature," "naturally," and "according to nature" in his depictions of constitutional change.⁴⁵ Indeed, one of the most striking aspects of his account is his use of a biological metaphor. Much as a botanist may become familiar with

⁴¹ Arist. *Pol.* 4.1.1288b21–1289a1. ⁴² Pl. *Plt.* 294b.

⁴³ Pl. *Leg.* 4.709a–b. Quotation at 709b. ⁴⁴ Polyb. 6.2.5–7.

⁴⁵ See Polyb. 6.4.7, 8, 9, 11, 12, 13; 6.5.1, 4, 7, 8, 10; 6.6.2; 6.7.1; 6.9.10, 13; 6.10.2, 4, 12; 6.57.1, 3.

the natural growth patterns of plants through observation, the scientific statesman “who observes each of these [constitutions] as it grows naturally (φύεται) may be able to see when, how, and where the growth, flowering (ἀκμήν), change for the worse, and end of each will recur again.”⁴⁶ In his rendering of Polybius’ *Histories* 6.4, Machiavelli substitutes “chance” for Polybius’ “nature.”⁴⁷ Whatever the relationship between nature and fortune might be for Machiavelli, there is this important difference for Polybius: nature may be studied with precision; fortune – insofar as it may be spoken of as “fortune” – may not.⁴⁸

As we turn to Polybius’ treatment of the mixed constitution, we can be almost certain that the concept is not to be “co-ordinated with the entire Platonic world-view,”⁴⁹ since with his views on fortune and the predictability of human nature Polybius has rejected the second and third principles of the Platonic view in addition to the first. Rather, the Polybian view of the mixed constitution follows from the alternative view that he has been advancing over against Plato.

According to Polybius, constitutional degeneration can be predicted with great accuracy. There is a little more variability in the transition from a corrupt constitution to a good regime. In particular, the law of nature that everything must eventually be corrupted into its opposite condition does not apply.⁵⁰ Because of this, while a good form of a simple constitution may arise from a degenerate form of the previous constitution (as Polybius hints is usually the case), it is also possible for a mixed constitution to arise. For example, the aristocrats who lead a revolution against a corrupt tyrant may end up sharing powers with the people and/or an individual or individuals with regal powers. Such an arrangement may come about due to the deliberate planning of an individual or as the result of an accumulation of the uncoordinated choices of

⁴⁶ See Polyb. 6.4.12.

⁴⁷ Machiavelli, *Discourses on Livy*, 1.2. See Mansfield (2001) 35.

⁴⁸ Frank Walbank recapitulates the standard view that much ambiguity clings to Polybius’ use of τύχη in Walbank (2002) 209–11. Walbank notes that while Polybius’ τύχη at times appears purposeful and providential, “she still takes pleasure in unexpected changes and reversals” (210). As such τύχη, unlike nature, remains outside the realm of precise scientific enquiry. For an attempt to draw on Stoic philosophy to render consistent the different senses in which Polybius speaks of τύχη, see Brouwer (2011).

⁴⁹ Jaffa (1956) 518. ⁵⁰ See Schofield (1999c) 747.

many individuals over time.⁵¹ With Sparta under Lycurgus (6.10) and the Roman Republic (6.12–18), Polybius provides us with an example of each.

Drawing on the sort of psychological insights into the causes of constitutional change identified by Polybius,⁵² Lycurgus realized that people tend to cooperate for the benefit of the *polis* only when compelled by some external fear of misfortune. When conditions are good and such external fears are absent, their selfish tendencies will be unrestrained and the form of the regime will turn to the worst. Lycurgus attempted to institutionalize this restraining fear by giving the people, elders, and a king each a share in the constitution. The arrogance of the monarch is “checked” (κωλυομένης) by his “fear” (φόβον) of the people and the popular contempt for the monarch is checked by fear of the elders.⁵³ If either the people or the monarch grows too powerful, the elders will switch sides to redress the imbalance. Beginning from his observations of human nature, Lycurgus has constructed a smoothly operating machine in which the carefully placed opposing forces operate in order to achieve the stability of the whole.⁵⁴ The resulting “balance of fear” has been referred to as “Machiavellian” by one commentator,⁵⁵ and with good reason. If human nature is able to be scientifically investigated and its underlying forces uncovered, as both Machiavelli and Polybius believe is the case, then it is possible to arrange these forces in such a way as to control them. Because Machiavelli and Polybius identify similar forces, it is not surprising that the way in which they choose to arrange these forces is also similar. Admittedly, the institutional arrangements utilized by Lycurgus differ from those emphasized by Machiavelli. For the latter, the key opposition is between the plebs and the nobles, who cancel one another out, thereby achieving equilibrium.⁵⁶ Still, Polybius and Machiavelli share similar underlying principles – even if their application may differ somewhat.

⁵¹ Polyb. 6.10.12–14. ⁵² See Hahn (1995) 38–9.

⁵³ See Polyb. 6.10.8.

⁵⁴ See Polyb. 6.10.7. Polybius uses the language of mechanics to describe the operation of the Spartan constitution.

⁵⁵ Schofield (1999c) 749.

⁵⁶ Machiavelli, *Discourses on Livy*, 1.4. See further Skinner (1978) 1:181 and Bondanella and Bondanella in the introduction to Machiavelli, *Discourses on Livy*, xix.

On Polybius' account, the basic principles behind the Spartan regime under Lycurgus account for the success of Rome's mixed constitution. However, there are two differences in the analysis. The first concerns the structure of the constitution. Unlike Lycurgus' Sparta, Rome does not employ the aristocracy as a remedy for any imbalance that may occur between the powers of the people and the king.⁵⁷ In addition to whatever historical grounds Polybius may have for this change, he has the following philosophical reason: given his account of human beings as consistently motivated by self-interest that impedes their judgment, for how long may one count on the elders "always to attach themselves to justice (τῶ δικαίῳ)?"⁵⁸ The Roman constitution owes no such part of its stability to the virtues of a given class. Rather, its stability comes from the strategic allocation of power among self-interested individuals and classes.

Polybius' detailed analysis of how power is distributed across the three classes is the second difference from his analysis of Sparta. The real virtue of Rome lies not just in its mixed constitution, but in the way in which fundamental powers are kept separate. This is a key innovation – and one often overlooked.⁵⁹ It is tempting to assume that there is a necessary relationship between the separation of powers of governing organs and the mixed constitution. However, the two are analytically different concepts. A regime can be mixed without a separation of governing organs, as in the case of the blending of the principles of freedom and authority represented by Athens and Persia respectively in Plato's *Laws*.⁶⁰ Alternatively, basic powers could be separated as easily in an aristocracy or democracy as in a mixed regime.

How are powers separated among the governing organs at Rome? According to Polybius, the consuls' chief powers include control over the military, while the most important power of the senate

⁵⁷ See Hahm (2000) 473. ⁵⁸ Polyb. 6.10.9.

⁵⁹ Scholars typically overlook the novelty of Polybius' investigation of power because they do not recognize that the separation of powers and the mixed constitution are analytically distinct. von Fritz (1954) 344–5 tends to elide the mixed constitution, separation of powers, and checks and balances, while Walbank (1957) 697 fails to draw any distinction whatsoever. For a historical study of the concept of the separation of powers, see Gwyn (1965).

⁶⁰ See Pl. *Leg.* 3.693c–e, 3.694b, 3.697c–d, 3.701d.

is over matters of revenue.⁶¹ The people's greatest power resides in its sole authority to administer honors and punishments and to judge capital offenses. They have much of the judicial power, and, through the office of the tribune, the ability to veto the Senate's decrees.⁶² These various powers are so distributed that each governing organ has the ability to aid or obstruct the actions of the others.⁶³ Moreover, each individual and each part is self-interested and fears having its own powers interfered with by others. In times of war, the "competition" (Polyb. 6.18.3: ἀμιλλωμένων) between parts to do the most to save the republic ensures that nothing is left undone. In times of peace, this same competitive and self-interested attitude keeps any one individual or part from growing too powerful. Ambition checks ambition.⁶⁴

By this point it is apparent that Polybius has rejected the fourth principle of the Platonic-Aristotelian framework as firmly as he had rejected the first three. Offices in the mixed constitution are arranged, not according to justice, but according to an understanding of the best way to apportion power to achieve the desired equilibrium of forces. Civil strife, opposition, and discord are not outlawed, but, as Andrew Lintott puts it, "domesticated and given a role in normal politics."⁶⁵ Conflict, which for Plato and Aristotle was harmful, is now productive. This final "Machiavellian" arrangement is the conclusion of an analysis of the political order that has been conducted throughout apart from the framework established by Plato and Aristotle. The system of checks and balances that characterizes the Polybian version of the mixed constitution reflects a radically different science of politics.

Scipio and Polybius

It is difficult to read the first two books of Cicero's *Republic* without thinking about Polybius' theory. Scipio, who bears the onus of leading the discussion on constitutional change and the mixed

⁶¹ Polyb. 6.13.1, 6.14.2.

⁶² See Polybius 6.14.4–12 for the people's power over honors, punishments, capital offenses, and courts. See Polybius 6.16.4 for the tribunate's veto power.

⁶³ Polyb. 6.15.1, 6.18.1. ⁶⁴ Polyb. 6.18. ⁶⁵ Lintott (1999) 219.

constitution, is a contemporary and friend of Polybius. In fact, Laelius points out that his friend “used to debate frequently with Panaetius in the presence of Polybius (two Greeks who are very experienced concerning political matters) and collected many arguments to show that the best condition of the state by far was that which our ancestors passed down to us” (*Rep.* 1.34). Scipio later cites Polybius as a source for certain details of his own account of Rome’s early history (*Rep.* 2.27). And during the course of his discussion, Scipio refers to the two most striking aspects of Polybius’ theory of constitutional change – the cycle of constitutions (*Rep.* 1.45, 64–5; 2.45) and the biological metaphor of birth, growth, and maturation (*Rep.* 2.3; cf. Polyb. 6.4, 9).⁶⁶ Thus, Polybius’ theory of constitutional change and his account of the development of the Roman mixed constitution lurk in the background throughout the discussion of Books 1 and 2.

In light of these frequent and unmistakable references and allusions, it is tempting to assume that Scipio accepts Polybius’ general account. If Scipio’s account departs on occasion from Polybius’, it is because he accepts the validity of his predecessor’s theory and sets for himself the task of modifying and improving upon its superstructure.⁶⁷ However, this is a position that we should hesitate to embrace. None of the passages which refer to Polybius and Polybian theory necessarily commits Scipio, much less Cicero, to the specific theories of constitutional change and the mixed constitution adopted by Polybius. Scipio carefully chooses his words when alluding to Polybius in order to leave some distance between his views and those of the Greek historian.

Consider just two examples. First, Scipio occasionally uses cyclical language to discuss constitutional change. This is surely meant to call to mind Polybius’ theory of *anakuklōsis*. At the same time, Scipio takes care lest the metaphorical language of cycles should

⁶⁶ Compare Cic. *Rep.* 2.3, *nascentem, crescentem, adultam*, with Polyb. 6.4.11–13, γένεσις, αὔξησις, ἀκμή.

⁶⁷ See Asmis (2005) esp. 392. The majority of commentators adopt a variation of this view. The most frequently cited Ciceronian alteration to Polybius’ theory is an emphasis on the cooperation rather than opposition of elements in the mixed constitution: see e.g., Nippel (1980) 154–6; Ferrary (1984) 91–3; Lintott (1997); Lintott (1999) 221–3; and Marquez (2011) esp. 407. For the incredible view that Cicero left Polybius’ account virtually untouched, see Taeger (1922) and von Fritz (1954) 123–54.

lead his interlocutors to suppose that he is endorsing the Polybian theory, which posits a quite literal cycle of constitutions. For example, he explains: “There are remarkable revolutions (*orbes*) and something like (*quasi*) cycles (*circuitus*) of changes and alterations in commonwealths” (*Rep.* 1.45). Despite the Polybian ring to this sentence, in context the revolutions and cycles refer to the path that each good form of constitution takes to its corresponding degenerative form; that is to say, Scipio here refers to the limited changes within a genus – so, for example, degeneration from monarchy (the good form of rule by one) to tyranny (the bad form of rule by one). He is not necessarily endorsing the whole Polybian scheme, which posits a cycle of changes across genera driven by sociological laws. Scipio widens the distance between himself and Polybius by using a simile. The revolutions are “similar to” or “like” (*quasi*), but not actually, cycles – unlike the literal cycle of constitutions in Polybius’ scheme.

Second, consider Scipio’s only reference to Polybius by name during the second book of Cicero’s *Republic* (*Rep.* 2.27).⁶⁸ Scipio remarks that his own dating of the duration of the reign of Rome’s second king, Numa Pompilius, to thirty-nine years follows the account of “our friend Polybius, who was unsurpassed in matters of chronology.” In a book that begins by echoing Polybius’ use of the biological metaphor (*Rep.* 2.3) and later features a request for Scipio to comment on Polybius’ theory of *anakulōsis* (*Rep.* 2.45), Scipio’s expressed debt to Polybius is only for a small question of chronology; he says nothing of the historian’s prowess in theorizing about constitutions, the subject of *Republic* 1 and 2. Scipio’s silence on Polybius’ achievements in political science is deafening.

We cannot, therefore, conclude a priori that Scipio takes over Polybius’ constitutional theory as a foundation on which to build. The references to Polybius, both explicit and implicit, are constructed in order to bring Polybius’ theory forward for the reader to consider without endorsing it as something that he or she should accept. The reader must determine whether the dialogue

⁶⁸ Polybius is also mentioned again during the discussion of Roman customs in *Republic* 4 (Cic. *Rep.* 4.1 = 4.3).

supports Polybius' position by assessing whether on balance Scipio's account agrees with the general framework of Polybius' political science.

Ideal regimes and chance

As in Polybius' analysis, Scipio's discussion of the mixed constitution depends upon the answers to some important prior questions of a methodological and philosophical nature. Of what use, if any, is the consideration of ideal regimes? How should the statesman respond to chance? How is he to understand human nature? The dialogue's answers to these questions derive from its science of politics, which we explored in the last chapter. Now it is time to see how this political science relates to the competing constitutional frameworks advocated by Polybius and Plato. We begin by focusing on ideal regimes and the role of chance.

While Polybius began by rejecting the usefulness of ideal regimes to guide the discussion of constitutional theory, Scipio follows Plato by establishing an ideal model under the guidance of which his investigation proceeds. To do so, he undertakes to explore what a just regime might look like under ideal conditions. In the previous chapter, we saw how this project connects the Dream of Scipio to the rest of the dialogue. The rational order of the planets under the rule of the sun provides some idea of the rational and just political rule given ideal conditions. It also calls attention to the irrationality that mars human political affairs. The statesman can only hope to provide a stable and lasting political order if he can approximate in his own soul the ideal rule of reason in the cosmos and thereby control the constant flux of the sublunar world.

The political analogue of the ideal rational rule manifested in the heavens is found in the rule of a just and wise monarch, who governs and exercises complete ruling authority (*imperium*) according to reason (*Rep.* 1.60). The contrast between Scipio's first mention of monarchy and Polybius' is stark. Polybius' primitive monarch is a product of conditions in the historical past, and the grounds for his rule are amoral – his uncommon strength. Scipio,

meanwhile, emphasizes that his first depiction of monarchy does not depend on historical contingency (*Rep.* 1.58). His monarch rules precisely because he is the wisest and most just, and these qualities constitute his only legitimate claim to rule (*Rep.* 2.43). With this picture, Scipio is returning to Plato's account in the *Statesman* of the ideal king who possesses true knowledge and justice.⁶⁹ Polybius had substituted his historical primitive monarch for Plato's ideal king. With Scipio's depiction of the just and wise monarch, Cicero once again places before his reader a model of wisdom, rationality, and justice.

But will such a just and wise monarch be readily at hand? Will such a regime be possible? Scipio, like Plato and Aristotle, suggests that ideal conditions rarely obtain, so most regimes will be non-ideal regimes that are the best given the conditions that do obtain. The contingency and flux that characterize political affairs ensure that the ideal regime will rarely come into existence and, even if it did, would be manifestly unstable before these forces (*Rep.* 2.43).

Scipio further articulates this view with his depiction of Plato's ideal regime in his *Republic*. The ideal regime is "to be prayed for" but cannot be expected to become an actuality (*Rep.* 2.52). Because conditions are rarely amenable to an ideal regime, "human life and customs" typically require a non-ideal regime that can only approximate the ideal regime (*Rep.* 2.21–2). We will see later in the chapter exactly what makes the Roman mixed constitution a practicable approximation of the ideally best form of rule represented by the cosmos and the ideal regime of Plato's *Republic*. For now, we will restrict our focus to how Scipio's move from the best regime absolutely to the best practicable regime makes chance an important concept.

Since Viktor Pöschl's suggestion that Cicero endowed the example of the historical Roman constitution with the attributes of a Platonic form,⁷⁰ scholars have sometimes suggested that the mixed constitution of *De republica* corresponds to Plato's model regime in the *Republic*.⁷¹ On this view, the Roman constitution is

⁶⁹ See Pl. *Plt.* 293c, 301a–303c. ⁷⁰ See Pöschl (1936) 99–107.

⁷¹ See most recently Asmis (2005) 395–6, esp. 395 n. 44.

to compete with the regime of the *Republic* for the status of the perfectly just regime given ideal conditions. Now Socrates had explained that the ideal city of the *Republic* was such a perfectly just regime precisely because, like a painter, he was free to copy the “divine pattern” of a just city directly onto a blank tablet.⁷² There was no need to take into account contingent circumstances or intractable human characteristics. Such contingencies are, however, taken into account in the *Laws*, which explains why the regime in the *Laws* can only approximate that of the *Republic*.⁷³ Because it is contingent upon historical, geographical, and political circumstances, the regime of the *Laws* would have taken on a different form if these circumstances were different, e.g., if the city had been Spartan instead of Cretan.⁷⁴ The ideal city of the *Republic*, however, is not contingent upon such circumstances. It is the ideal city before the variables of human nature and history are fully considered.

Unlike the ideally just regime in the *Republic*, and like the regime in the *Laws*, the Roman constitution of Cicero’s *Republic* depends upon particular circumstances. Rome, unlike Kallipolis, had a history. Had this history been different, the details of its constitution would have been different. The point is emphasized throughout the discussion of the history of Rome’s development in Book 2. The key to the development of the Roman constitution lies precisely in the foresight of statesmen and their collective response to contingencies over time. Rome was fortunate to have been forged by many generations of statesmen successively responding to changing circumstances, for, as Scipio argues, “all the talent in the world collected in a single place at one time could not see to it that all circumstances were accounted for (*providere ut omnia complecterentur*) without practical experience over a long period of time” (*Rep.* 2.2). While Scipio’s account of early Rome focused on Romulus’ calculations (*ratio*), Laelius reminds us that chance (*casus*) and necessity (*necessitas*) also played an important role in Rome’s foundation (*Rep.* 2.22). As Scipio himself later points out, “the very nature of political affairs often defeats

⁷² Pl. *Resp.* 6.500d–501c.

⁷³ See Pl. *Leg.* 5.739c–e, 9.858a–c.

⁷⁴ See Pl. *Leg.* 5.747d–e.

reason” (*Rep.* 2.57). By replacing the regime of the *Republic* which Socrates made up himself (*Rep.* 2.22) with historical Rome, Scipio introduces the consideration of chance into his treatment of constitutional theory. In doing so, he is following Plato, who, in abandoning the made-up territory of the *Republic* (*Rep.* 2.21–2) for Crete, likewise concludes that chance is an important factor for setting up a regime.⁷⁵ To equate the Roman mixed constitution of *De republica* with Plato’s ideal state in the *Republic* obscures the role that contingency plays in Scipio’s constitutional analysis. After Polybius had removed chance as a factor for the scientific study of constitutional theory, Scipio, following Plato, has reintroduced it.

We see, then, that Scipio – unlike Polybius – adopts the Platonic method of orienting investigations into constitutional theory according to the ideally just regime. This regime provides a model and reference point for assessing other non-ideal regimes. The move from the ideal to the non-ideal regime, from the ahistorical to the historical, emphasizes chance and contingency which the statesman must accommodate. Thus, Scipio accepts the first two principles of the Platonic-Aristotelian framework that Polybius had rejected.

Human nature and constitutional change

This brings us to the third principle of the Platonic-Aristotelian framework as well as to Scipio’s treatment of constitutional change and the account of human nature on which it depends. At two places in his discussion, Scipio calls into question Polybius’ account. In each instance, Scipio brings Polybius’ theory of constitutional change to the reader’s attention only to challenge (with some help from Plato) its central premise – the predictability derived from the prior account of human nature.

The first passage runs from *Rep.* 1.64 to 1.68, but really continues a line of thought begun at *Rep.* 1.45. We observed earlier that in this passage Scipio invokes Polybius’ theory of

⁷⁵ Pl. *Leg.* 4.709a–b.

anakuklōsis while effectively distancing himself from his predecessor's views by suggesting that the movements of constitutions were metaphorical. Now we will see yet another way in which Scipio departs from Polybius' account of constitutional change. Scipio suggests that "to recognize" the "remarkable revolutions and something like cycles (*circuitus*) of changes and alterations in commonwealths" is the job of "a wise man (*sapientis*)" and "to foresee them as they are approaching (*prospicere impendentes*), directing their course (*moderantem cursum*) and keeping it under his control while governing the commonwealth, is the part of some *great citizen and nearly divine man* (*magni cuiusdam civis et divini paene est viri*)" (*Rep.* 1.45; emphasis added). Read in light of Polybius' theory, this statement is striking. While Polybius argued that pretty much any competent person who follows his principles could accurately predict the future,⁷⁶ Scipio suggests that such predictive ability belongs only to the wise man. Moreover, the further step of applying these insights to politics has been removed from the realm of run-of-the-mill politicians and allotted to someone "nearly divine." Scipio apparently does not share Polybius' optimism that constitutional change can be easily and accurately predicted, let alone forestalled by institutional engineering.

The reason for this apparent pessimism is made clear later in the first book when Scipio concludes his analysis of constitutional change with a sporting metaphor:

And so like a ball, they snatch political rule (*rei publicae statum*) from one another: tyrants take it from kings; aristocrats or the people acquire it from them; and from them either oligarchies or tyrants acquire it. The same form of constitution (*idem rei publicae modus*) is never held for long. (*Rep.* 1.68)

Here we learn why prediction is so difficult: there is not one fixed or highly probable pattern of constitutional change. In this assessment Scipio sides with Aristotle rather than Polybius.⁷⁷

Why, though, should Scipio reject Polybius' account? The answer has to do with the psychological principle that lends the Greek historian's theory its predictive power.

⁷⁶ See Polyb. 6.9.11. ⁷⁷ See Arist. *Pol.* 5.12.1316a1–b27.

Remember that for Polybius human beings are self-interested, and unless this tendency towards self-aggrandizement is checked by fear, the resulting moral degeneration will lead to constitutional degeneration. This simple observation allows him to predict both the decline of a good regime and the revolution that overthrows a degenerate regime. The decline of regimes happens from the top down, as it were, when rulers who are secure in their offices no longer practice self-restraint. Revolutions occur when their subjects become outraged at these offenses.

For Scipio Polybius' simple observation proves too simple. When asked by Laelius to comment on Polybius' theory of constitutional change (*Rep.* 1.64),⁷⁸ Scipio turns to Plato. In the section from *Rep.* 1.65–8, which concludes with his disavowal of any fixed constitutional order at 1.68, he adapts Plato's account of constitutional and psychic degeneration from *Republic* Book 8, 562c–569c. Here Scipio considers an alternative not considered by Polybius: what if the people depose a *just* king or, even more likely, *just* aristocrats?

If ever the people (*populus*) has applied force to a just king or deprived him of his kingdom or yet again, as happens more often, has tasted the blood of the foremost citizens and has subjected the entire commonwealth to its own desire – don't suppose, however, that any ocean or fire is so great that it is not easier to sedate than a mob (*multitudinem*) wild (*effrenatam*) with insolence – then there occurs that which is so eloquently described in Plato. (*Rep.* 1.65)

The metaphorical tasting of blood, which Scipio applies to the people, was taken from Plato's discussion of the tyrant-turned-wolf, who tastes the blood of his own supporters.⁷⁹ However, in the scenario that Scipio entertains, it is the people that has become

⁷⁸ Although Polybius is not mentioned by name, commentators are right to see “those courses of changes (*cursus istos mutationum*)” of interest to Laelius as evocative of Polybius' theory of *anakuklōsis*: see Cumming (1969) 1:215; Büchner (1984) 131, 157; and Rudd and Powell (1998) 182 n. 21. Moreover, a comparison between their respective descriptions of democratic revolution provides further evidence that Cicero is referring to Polybius' account: Compare especially Polyb. 6.9.3, τὴν δὲ τῶν κοινῶν πρόνοιαν καὶ πίστιν εἰς σφῶς αὐτοὺς ἀνέλαβον (“and they [the people] take into their own hands the oversight and trusteeship of the commonwealth”), and Cic. *Rep.* 1.65, *tuerique vult per se constitutam rem publicam* (“and [the people] wish to guard the commonwealth that they themselves have established”). Cicero uses *res publica* to translate τὰ κοινά. Once again, the references to Polybius alert the reader to the contrast between the two accounts.

⁷⁹ Pl. *Resp.* 8.565e. See further Cumming (1969) 1:221.

tyrannical while the leaders (*principes*) of the commonwealth have remained morally good.⁸⁰ These leaders have “often served the *res publica* well (*bene saepe de re publica meritos*)” (*Rep.* 1.68). Revolution occurs not because they have committed injustices against the people (as in Polybius), but because the wild people itself (*populo ... immani*) has become tyrannical. In fact, the people possess the same qualities as the tyrannical king, whom Scipio also describes as a wild animal:

For at the very moment that this king turned himself to a more unjust mastery (*dominatum*), he immediately became a tyrant. No animal (*animal*) can be imagined that is more horrible or more loathsome or more hateful to gods and men than the tyrant. Although he is in the shape of a human being (*figura hominis*), nevertheless through the wildness (*immanitate*) of his character he surpasses the most monstrous beasts. Who could rightly give the name “human being” to someone who wants for himself no association of law, no partnership of humanity with his fellow citizens and indeed with the entire human race? (*Rep.* 2.48)

Once again, Scipio evokes a passage in Plato’s *Republic*. In Plato’s account, human beings are depicted as having a composite nature – beneath the human exterior lurks a wild beast. The person who wishes to be just seeks to starve the beast within and diminish its influence. The tyrant, however, nourishes the beast until he is subjected to its dominion. Though he appears to be the master of all, the tyrant in the end is not even the master of himself.⁸¹ Scipio draws on this depiction of a tyrant. By virtue of his wild character, the tyrant is in reality a beast (*belua*), which possesses only the outward appearance or form of a human being. Tyranny is not only a constitution – the bad form of single-person rule; it is also a condition. This is why Scipio could earlier entertain the notion of a tyranny of the people. By ascribing tyrannical qualities to the people as well as the tyrant, Scipio indicates that the ruled and rulers are equally prone to the moral degeneration that leads to constitutional degeneration.

What does this account have to do with Scipio’s reluctance to accept Polybius’ account of constitutional change with its fixed cycle of constitutions? Contrary to Polybius, Scipio has made it

⁸⁰ See Büchner (1984) 163. While Plato’s financial class provides food for the drones and thus hastens the decline of the state, Cicero’s *principes* are good citizens and patriots who have nobly served the commonwealth.

⁸¹ Pl. *Resp.* 9.588c–590d.

clear that constitutional degeneration does not necessarily come from the top down; the atrocities of rulers do not always cause revolution. Scipio does not provide an explicit reason for this divergence. It is important to note, however, that according to Scipio's description of moral and constitutional decline, social and individual security and fear play no part. Those who held office and enjoyed its security remained morally good, even while the people declined into anarchy.⁸² Presumably the complacency and sense of security that comes from holding office, and with it the absence of fear, are no longer the determining factor for the moral decline that leads to constitutional decline.

This conjecture finds support when we turn to the second place where Scipio questions Polybius' theory of constitutional change. It is found partway through Book 2. Scipio is working his way through the history of the early kings. When he reaches Tarquinius Superbus, he breaks off the narrative to point out the importance of the events surrounding his tyranny. "Here now the circle (*orbis*) will turn. Learn to recognize from the beginning its natural motion (*motus*) and circuit (*circuitus*)" (*Rep.* 2.45). Once again, the language is evocative of Polybius' theory. Scipio goes on to present Tarquinius Superbus as the historical analogue of Plato's ideal tyrant in *Republic* 9 (*Rep.* 2.51); he uses him to explore moral and constitutional degeneration further.

Nam rex ille de quo loquor, primum optimi regis caede maculatus integra mente non erat, et cum metueret ipse poenam sceleris sui summam, metui se volebat; deinde victoriis divitiisque subnixus, exsultabat insolentia, neque suos mores regere poterat neque suorum libidines. (*Rep.* 2.45)

For that king about whom I am speaking at first was not sound in mind because he had been stained by the murder of the best king. Since he himself feared the greatest punishment for his crime, he wanted himself to be feared. Next, relying on his victories and riches, he began to run riot in his insolence, and could rule neither his own conduct nor the lusts of his own family.

Like Polybius, Scipio gives a psychological explanation for the degeneration: the monarch declines into a tyrant because he has an unsound mind (*integra mente non erat*) and becomes unable

⁸² See Cic. *Rep.* 1.67: "The souls (*mentes*; cf. Pl. *Resp.* 563d5: ψυχῇ) of the citizens become so squeamish (*fastidiosae*) and soft that if the smallest amount of authority is applied, they become angered and they are unable to bear it."

to control his own conduct and his family's desires (*libidines*).⁸³ However, once again Polybius' socio-psychological insights conspicuously are not applied. The tyrant commits increasingly severe offenses not because the security of his office has removed fear of retribution but rather the opposite: filled with fear of retaliation, he is provoked to more virulent crimes.⁸⁴

Behind Scipio's reluctance to apply Polybius' insights lies Scipio's own political psychology based on a different understanding of human nature. We explored this psychology in some detail in the last chapter and saw that Scipio argued that human beings respond not only to reason but also to a multitude of conflicting passions. Let us return briefly to the metaphor of the elephant and trainer that Scipio uses to illustrate his point.

Therefore that Indian or Carthaginian controls a single beast, one that is docile and familiar with human customs. However, what lies hidden in the souls of human beings, the part of the soul called the mind (*mens*), governs and masters not a single beast or one easy to tame, and it rarely is able to accomplish the task. (*Rep.* 2.67)

Here again, Scipio turns to Plato. Echoing Socrates' account of tyranny in the *Republic*, Scipio suggests that the beast that lurks within the human soul is composite rather than simple.⁸⁵ Human beings are a complex mix of passions and reason; human nature lacks transparency. The Machiavellian and Polybian view of human beings as invariably rational and self-interested actors and hence predictable is jettisoned. The third principle of the Platonic-Aristotelian framework, the plasticity and unpredictability of human nature, is affirmed.

With Scipio's view of human nature, we at last arrive at the basis of his challenge to Polybius' theory of constitutional change. Because of the plasticity of human nature, a single law or principle for the prediction of human behavior proves inadequate. In particular, because human beings are not unfailingly motivated by rational self-interest, they cannot be counted upon to respond to the presence of fear with the consistency of Polybius' rational and self-interested agent.

⁸³ See Büchner (1962) 119, esp. 119 n. 5.

⁸⁴ For further anti-Polybian elements in this section, see Pöschl (1936) 67.

⁸⁵ Pl. *Resp.* 9.588c.

The Roman mixed constitution

Unsurprisingly, Scipio's foregoing critique of Polybius has important implications for his own discussion of the Roman mixed constitution, which departs significantly from that of his predecessor. What are its distinguishing elements?⁸⁶

Let's begin with a piece of terminology. The Greek word that I have been translating as "constitution" in Polybius' *Histories* is *politeia*. The English word "constitution" connotes especially a regime's political structure, that is, the arrangement of offices in a state. According to Aristotle, the Greek word *politeia* certainly has this connotation; however, it also has a broader point of reference – the political culture or "way of life" of the citizens of a given *polis*.⁸⁷ For this reason, scholars sometimes prefer to translate *politeia* with a word like "regime," which may less strongly connote institutional structure.

The word "constitution," however, seems to work well given Polybius' account of the mixed *politeia*, where the institutional structure receives much emphasis. Such constitutive elements of a state's political culture as religion, education, customs, and laws play a strikingly diminished role in Polybius' analysis of the operation of the mixed constitutions of Sparta and Rome, especially when contrasted with the prominence of such considerations in Plato's political theory.⁸⁸ In fact, Polybius does not consider customs and laws (ἔθη καὶ νόμοι) in *Histories* 6 until he compares different historical regimes much later in the book. To be sure, in this section he does claim that customs and laws are of fundamental importance.⁸⁹ However, he substantially weakens this claim by using the Spartan regime under Lycurgus as a key example, for he had already previously explained Sparta's success completely in terms of Lycurgus' successful institutional engineering.⁹⁰

⁸⁶ Some of the following material in this section also appears in J. W. Atkins (2013).

⁸⁷ Arist. *Pol.* 4.11.1295a25–26, 1295a40–b1.

⁸⁸ For an account of many of these elements in Plato's political philosophy, see Schofield (2006).

⁸⁹ See Polyb. 6.47.1–4.

⁹⁰ Lycurgus' Sparta is discussed at Polyb. 6.46–9 and earlier at Polyb. 6.10.

Polybius mentions religion at the very end of the book during his final analysis of Rome. Here he takes a strictly utilitarian view of religion, which confirms that the basic principles established in his initial statement of constitutional theory continue to be operative throughout the book. The Roman elite established religion to check the masses and ensure a proper balance of power: “it is necessary [for the elite] to check (συνέχειν) the multitude with invisible fears (τοῖς ἀδήλοισι φόβοις) and similar pageantry.”⁹¹ Religion is a tool that helps to achieve the requisite balance of fear.

Scipio’s account, on the other hand, restores political culture to its central position in constitutional analysis. Education, law, custom, and religion are all important components of the Roman regime. These elements receive particular emphasis in Scipio’s account of the reign of Rome’s second king, Numa Pompilius. Numa recognized that education (*institutum*) under the reign of Romulus had improperly shaped the spirited parts of his citizens’ souls. This deformity hindered the growth of such important social virtues as justice and faithfulness. As part of his educational initiative, Numa introduced agriculture. Consequently, “he implanted (*iniecit*) in them the love of leisure and peace, by which justice (*iustitia*) and faithfulness (*fides*) most easily grow in strength” (*Rep.* 2.26).⁹² As part of his reforms, Numa also made changes to religious law and custom (2.26) and “introduced markets, games, and all sorts of reasons for gatherings and festivities” (2.27). Scipio concludes: “By establishing these measures, he recalled to humanity and gentleness (*ad humanitatem atque mansuetudinem*) the souls of men which had previously been savage (*immanes*) and wild (*feros*) with desires for war” (2.27).⁹³ Numa had recognized that the people were beginning to exhibit the savage wildness characteristic of tyrants (*Rep.* 1.68, 2.48). Through his education reforms, he recalled the people to humanity and thereby preserved the *res publica* from revolution.

⁹¹ Polyb. 6.56.11.

⁹² The agricultural metaphor used by Scipio to describe the effects of Numa’s education reform is reminiscent of Plato’s *Republic* 8.550b, where Socrates similarly uses an agricultural metaphor to describe the growth of the various parts of the soul. At this stage in Socrates’ account the spirited part of the soul becomes dominant.

⁹³ Once again, there is a Platonic reminiscence. At *Republic* 3.410a–e we are told that one of the goals of education is to tame and soften the savage and overly spirited soul.

The example of Numa is very important for Scipio's account of the Roman constitution, for it suggests that the recipe for a stable regime cannot be reduced to the analysis and distribution of power. The constitution must provide for an advising and educative element, whose contribution to the state cannot be measured in terms of power. Scipio makes the point more directly a little later in Book 2.

Remember what I said at the beginning: unless there is an equitable (*aequalis*) balance in the state of rights and duties and offices, so that there is enough power (*potestas*) in the magistracies, authority (*auctoritatis*) in the deliberation of the senate, and liberty (*libertatis*) in the people, then the constitution of the commonwealth is unable to be preserved unchanged. (2.57)

Like Polybius, Scipio proposes the mixed constitution as a counter to the destabilizing effects of constitutional change. But there is a key difference in their presentations of the concept. Polybius had analyzed the workings of Rome's mixed constitution entirely in terms of power. Rome's constitution worked because the consuls, senate, and people all had separate and counterbalancing powers. Whether analyzing magistracies or the senate, Polybius was concerned with power (*δύναμις*).⁹⁴ Scipio, on the other hand, distinguishes between the power (*potestas*) that attaches to the magistracies and the authority (*auctoritas*) that the senate should possess.

Why did Scipio draw a distinction between *potestas* and *auctoritas* and assign the latter to the senate? In his undergraduate lectures on the history of political thought, Michael Oakeshott provides an important analysis of *auctoritas* and *potestas* in Roman thought.⁹⁵ He writes:

The relationship between an *auctor* and the *populus Romanus* was, fundamentally, a tutorial relationship: to exercise *auctoritas* was to advise, to give guidance, and to educate. And in relation to *res publica*, what was expected from those who were recognized to have *auctoritas* was, *not* command and executive direction, but reflective advice and the sort of initiative in policy-making which could be supplied by men steeped in the *traditio* which joined the present generation to its roots in the original foundation. Thus *auctoritas* was an activity at once limited in its inspiration and totally unlimited in its range; and, as the Romans

⁹⁴ See Polyb. 6.16.1. ⁹⁵ See Oakeshott (2006) 224–36.

thought of it, it supplied something indispensable for the care and custody of *res publica*. It was a spring of political initiative, not a reservoir of political power; for, to have *auctoritas* was, precisely, *not* to have power (*potestas*); it was to be a teacher, not a commander.⁹⁶

Oakeshott's analysis illuminates nicely a key feature of Scipio's account of the Roman mixed constitution. By distinguishing between *potestas* and *auctoritas* and giving the latter an indispensable role in his account of the mixed constitution, Scipio recognizes that one cannot forge a stable regime from the proper distribution of power (δύναμις, *potestas*) alone. The senate provides guidance, advice, direction, and education for the people of Rome. Its possession of *auctoritas* establishes a connection with Romulus, the original *auctor* who first established the senate and endowed it with *auctoritas* (*Rep.* 2.14–15). Romulus' successor, Numa, had educated the people by establishing those customs and traditions appropriate for developing a people whose character was suited for the blossoming of social virtue. The *auctoritas* of the senate provides an enduring connection to these customs and thereby continues to educate and guide the people. And in fact such education and guidance is necessary for a stable regime. *Auctoritas* is a uniquely Roman idea with no counterpart in Greek political thought⁹⁷ and was completely absent from Polybius' analysis of the mixed constitution.⁹⁸

In addition to power and authority, Scipio argues that the mixed constitution should possess liberty (*libertas*). If a regime is going to avoid revolution, it must achieve “an equitable (*aequabilis*) balance in the state of rights, duties, and offices” that leaves “enough liberty” for the people (*Rep.* 2.57). This formulation sounds slightly strange. One might have expected liberty to be a product of the mixed constitution that all Roman citizens enjoy because this regime effectively guards them from falling into the mastery and domination of a tyrant. Isn't the purpose of the mixed constitution to secure liberty for the Roman people as a whole,

⁹⁶ Oakeshott (2006) 226.

⁹⁷ See Dio Cassius 55.3.5 and Oakeshott (2006) 228.

⁹⁸ For an overview of the Roman concept of *auctoritas*, with comparison to the American Founding Fathers' notion of authority, see Arendt (2006) 191–6.

senators and plebeians alike?⁹⁹ And yet Scipio identifies liberty as the particularly democratic element in the constitution, which he contrasts with the authority of the senate and power of the magistrates. In order to understand Scipio's provision for liberty, it is important to recognize that "freedom" (*libertas*) and "equitable" (*aequabilis*) are political terms whose meanings were contested no less in Republican Rome than today. According to Cicero, these ideology-laden terms lay at the center of political disputation at Rome, both at the dialogue's dramatic date and at the time of its composition.

Consider first Cicero's estimation of the political situation at the time of the dialogue's composition. In his *Pro Sestio*, delivered in 56 BC just a few years before he began work on his *Republic*, Cicero had famously divided politicians into two classes: *optimates* ("the best ones") and *populares* ("the populists"). While the former promulgated policy with a view towards gaining the approval of the best men (*optimus quisque*), the latter sought to please the multitude (*multitudo*).¹⁰⁰ Cicero holds the *populares* responsible for revolutions (*novos motus conversionesque rei publicae*). Interestingly, he subjects these politicians to psychological analysis and posits that the underlying cause is due to a failure of reason ("because of some ingrained passionate desire of the soul"; *propter insitum quendam animi furorem*).¹⁰¹ As in Scipio's analysis in the *Republic*, so in *Pro Sestio* we find that irrationality is the fundamental force in political affairs.¹⁰²

Of central importance to the conflict between the *optimates* and *populares*, as Cicero saw it, was a conflict over the meaning of *libertas*. The *populares* believed that true liberty is democratic liberty, which required numerical equality rather than equality of merit. In the name of such liberty, the *populares* argued for measures such as voting by ballot. These measures enjoyed much support by the people, who considered them to be essential

⁹⁹ So N. Wood (1988) 164.

¹⁰⁰ Cic. *Sest.* 96. For a helpful discussion of how the famous political excursus at *Sest.* 96–135 relates to Cicero's overall purpose in *Pro Sestio*, see Kaster (2006) 31–7.

¹⁰¹ Cic. *Sest.* 99.

¹⁰² In *Pro Sestio* Cicero often indicates human irrationality by comparing human beings to animals (16, 18, 111, 112). For further analysis, see N. Wood (1986).

to “their own liberty.”¹⁰³ From the point of view of an *optimas*, however, freedom that exists without any respect for worth (*dignitas*) is really a perversion of liberty (*licentia*).¹⁰⁴ This is the line that Cicero takes in *Pro Sestio*. He portrays the historical debates over the ballot laws as an instance in which “the desire of the many and the advantage of the people differed from the interests of the *res publica*.”¹⁰⁵ In contrast to numerical equality and egalitarianism, Cicero made his key political concept *dignitas*, a term which “denoted the esteem and standing enjoyed by an individual because of the merit that was perceived to exist in him.”¹⁰⁶ Virtue and merit are the salient political concepts, and it is only within the context of a regime based on respect for worth (*dignitas*) that the people will have freedom.¹⁰⁷

Returning to *De republica*, we find that the cloud of ideological conflict hovers over the conversation of Scipio and his companions, which occurs just a few years after the tribune Tiberius Gracchus had introduced legislation to provide for the distribution of public land to the poor. The law proved to be extremely divisive; Laelius observes near the beginning of the dialogue that there are now in Rome two senates and almost two peoples as a result of Gracchus’ reforms (*Rep.* 1.31). Central to this dispute (as the dialogue portrays it) is a disagreement over the concept of liberty set out along similar lines as in *Pro Sestio*.

Scipio himself lays out the competing views. The democrats maintain that the desire for liberty is natural; after all, they point out, even wild animals desire it (*Rep.* 1.55). The type of liberty that they have in mind is the particularly democratic version, which holds that if liberty is not completely impartial (*aequa*), then it is liberty only in name (1.47). The aristocrats disagree and argue as Cicero did in *Pro Sestio*. For them, liberty requires equality of worth rather than numerical equality. Numerical “equality itself

¹⁰³ Cic. *Sest.* 103: *populus libertatem agi putabat suam*. For a discussion of the ballot as a measure debated between the *optimates* and *populares* on the grounds of liberty, see Wirszubski (1950) 50.

¹⁰⁴ Thus Cicero reports in *Pro Sestio* that the *optimates* “feared the license (*licentiam*) of the ballot” (103).

¹⁰⁵ Cic. *Sest.* 103. ¹⁰⁶ Mitchell (1991) 47. ¹⁰⁷ Cic. *Sest.* 137.

is inequitable because it takes into account no degrees of worth (*gradus dignitatis*)” (*Rep.* 1.43; cf. 1.53).¹⁰⁸

Scipio himself probably prefers the aristocratic position; his first critique of numerical equality occurs *before* he begins to speak on behalf of the aristocrats for the sake of argument (*Rep.* 1.43). Moreover, in a fragment preserved by Nonius, we find the following statement: “And truly in civil dissension, when the good are worth more than the many, I think that citizens ought to be weighed, not counted” (*Rep.* 6.4 = 6.1). We do not know the identity of the speaker, but it is consistent with Scipio’s earlier criticism of numerical equality. Finally, Scipio’s especially lengthy translation and paraphrase of Socrates’ account of the democratic regime in Plato’s *Republic* shows his concern with the political dangers invited by the democratic view of liberty. Such views make extreme democracies ripe for tyranny, easy pickings for demagogues who would enslave the commonwealth by employing such popular measures as the redistribution of property.¹⁰⁹

However, Scipio does not suggest that his position is true without qualification. He does not completely side with the aristocrats and reject the democratic argument for democratic liberty out of hand, as Cicero does in *Pro Sestio*.¹¹⁰ Like Plato and Aristotle, Scipio understands that the regime that one would pray for is most likely “not practicable” (*non posset esse*; *Rep.* 2.52). Therefore, if one is to craft a stable regime, one must consider what is possible given human nature and the character of the people for whom one is legislating. Scipio seems to have understood the degree to which

¹⁰⁸ Although Scipio does not designate this argument as aristocratic at *Cic. Rep.* 1.43, he puts a similar argument into the mouths of the aristocrats at 1.53.

¹⁰⁹ For Scipio’s translation of Plato’s account of the extreme democracy, see *Cic. Rep.* 1.66–7. For Scipio’s paraphrase that emphasizes the redistribution of property as a popular measure, see *Rep.* 1.68. He is paraphrasing *Pl. Resp.* 8.565a7–8, 565e7–566a4.

¹¹⁰ Scholars commonly assume that Cicero is as unflinchingly devoted to the aristocratic/optimate line of argumentation in *Rep.* as he was in *Pro Sestio*: see Mitchell (1991) 47; Schofield (1995) 77–80; and Kaster (2006) 379–80. However, proponents of this view freely attribute to Cicero views that Scipio has aired while he is speaking not in his own voice but as an advocate of aristocracy (*Rep.* 1.51–3), just as he had earlier spoken as a democrat (*Rep.* 1.47–50). Scipio is not necessarily endorsing the aristocratic (and democratic) arguments that he recites. In fact he later states that in his own opinion the best simple form of constitution is monarchy (1.54). Thus, we should remain open to the possibility that Cicero does not adopt in the *Republic* the same strict aristocratic line that he articulated in *Pro Sestio*.

democratic liberty appeals to human beings. After some reflection on human nature, he decides that free men “are hardly able (*vix possunt*)” to go long without a degree of such freedom (*Rep.* 1.69). Some concession must be made to the will of the many (*voluntatiue multitudinis*). Consequently, the constitution must make provision for democratic freedom (*aequabilitatem quandam*) if constitutional change is to be forestalled for any substantial length of time. The mixed constitution incorporates an element of democratic freedom, even while maintaining the authority of the senate and “something outstanding and kingly” (1.69).¹¹¹

Scipio could find precedent for his position in Plato’s *Laws*.¹¹² “There are,” the Athenian Stranger argues, “two types of equality. Although they have the same name, in practice they are very often almost opposites.”¹¹³ The first is numerical equality, while the second “distributes what is fitting to each according to proportion.”¹¹⁴ Equality of merit is best by far, but must be mixed with numerical equality if division within the *polis* is to be avoided. “And so,” he concludes, “we must necessarily use both types of equality but the one requiring fortune [numerical equality] as little as possible.”¹¹⁵ According to Plato’s account, the regime that would avoid revolution will make some provision, however small, for numerical equality.

The Athenian Stranger’s advice to allow for a measure of numerical equality is designed to account for the attraction that democratic freedom has for human beings. Given human nature, Plato in the *Laws* does not try to construct a regime like Kallipolis in the *Republic* that will subordinate to complete rational control the excessive desires of the Athenian citizens for liberty. Rather, he accommodates these ineradicable desires by incorporating the

¹¹¹ As we will see, the character representing Cicero himself makes a similar argument in Book 3 of *De legibus*. There considerations of what is practicable (*quid possit*) convince Marcus to make provision in his legislation for voting by ballot, one of the measures of providing for numerical equality championed by the *populares* that Cicero had dismissed in *Pro Sestio*. For this reason, he rejects the strict position of the *optimates* supported by his brother Quintus (Cic. *Leg.* 3.33–9).

¹¹² For the suggestion that Plato’s *Laws* is the source for Scipio’s concern with the distinction between numerical equality and equality of merit at *Rep.* 1.43 and 1.69, see Nicolet (1970) 64 and Asmis (2005) 403.

¹¹³ Pl. *Leg.* 6.757b. ¹¹⁴ Pl. *Leg.* 6.757c. ¹¹⁵ Pl. *Leg.* 6.757e–758a.

Athenian desire for freedom (“the extreme case”) into the constitution. Consequently, the regime of the *Laws* will be a mix of democratic and monarchical principles.¹¹⁶ This mixed constitution moderates the excess of freedom and produces freedom (ἐλευθερία), friendship (φιλία), and wisdom or intelligence (φρόνησις, νοῦς).¹¹⁷

Scipio’s debt to Plato’s *Laws* is evident. Just as the Athenian Stranger suggested that the constitution is to embody freedom, friendship, and wisdom, so Scipio argues that the Roman mixed constitution includes affection (*caritas*), judgment or wisdom (*consilium*), and freedom (*libertas*). Fashioning his constitution from three rather than two simple constitutions, he associates *caritas* with monarchy, *consilium* with aristocracy, and *libertas* with democracy (I.55).¹¹⁸ Scipio clearly has derived his basic conception of the mixed constitution as a combination of the values associated with the various simple constitutions from Plato’s *Laws*.

Following the Athenian Stranger’s precedent, Scipio has proposed a mixed regime which incorporates the democratic desire for freedom while moderating its excesses. This is Scipio’s answer to the problem posed by the destabilizing potential of the natural-but-not-completely-rational desire for democratic freedom. The wild mob, intoxicated by freedom without limits, which Socrates described in Plato’s *Republic*, can be averted if freedom is blended into the regime with other principles. In such a regime, there is stability and no cause for revolutions (*Rep.* I.69).¹¹⁹ Following Plato, Scipio does not offer checks and balances as the mechanism for ensuring stability, such as we find in Polybius. Instead of forestalling revolution by obstructing desires, the mixed constitutions in Cicero’s *Republic* and Plato’s *Laws* limit the desire for freedom (*libertas*/ἐλευθερία) with prudence (*consilium*/φρόνησις). The result is both a politically and a psychologically harmonious and stable order.¹²⁰

¹¹⁶ Pl. *Leg.* 3.693d; cf. 6.756e.

¹¹⁷ Pl. *Leg.* 3.693c–e; cf. 3.694b, 3.701d.

¹¹⁸ For further analysis, see Ferrary (1984) 92 and Marquez (2011) 411–12.

¹¹⁹ See Pl. *Leg.* 3.693d.

¹²⁰ The Athenian Stranger does use the language of checks and balances earlier in the *Laws* when discussing the Spartan regime (Pl. *Leg.* 3.691d–692a). However, the Athenian Stranger later critiques this arrangement. The Spartan regime has overemphasized courage

This is an important point. For both Plato and Scipio, the mixed constitution continues to share the same goal as the ideal regimes represented in their respective *Republics* by Kallipolis and the cosmos, that is, harmony and stability.¹²¹ Thus, Scipio is able to apply Socrates' picture of the just individual and city of Plato's *Republic* to the Roman mixed constitution of his own *Republic*. Borrowing Socrates' musical metaphor from *Republic* Book 4 (443d–e) and anticipating the harmony of the cosmic music produced by the cosmos in Book 6, Scipio says that the state “sings by the agreement (*consensu*) of the very different groups. What is called harmony (*harmonia*) by musicians in song is concord (*concordia*) in the state” (2.69).

However, the mixed regime produces harmony not through complete subordination to reason's rule, but because the statesman recognizes that he must make some concessions to human desires, especially the desire for democratic freedom. Scipio illustrates his point through the historical examples of Lucius Valerius Potitus and Marcus Horatius Barbatus, the consuls of 449 BC, who were “men wisely democratic for the sake of concord” (*hominum concordiae causa sapienter popularium*; 2.54). But Roman history also shows the consequences of the failure to make these accommodations. Postumus Cominius and Spurius Cassius, the consuls of 493 BC, overlooked the natural attraction of freedom and rights for the Roman people. “Perhaps this development was not rational,” Scipio points out, “but the very nature of political affairs often prevails over reason.” The result of the consuls' oversight? Revolution (*Rep.* 2.57).¹²²

Scipio's most elegant statement of the mixed constitution comes at the end of Book 2, and is also his most famous and influential – a passage quoted by political thinkers from St. Augustine to John Adams.¹²³ It is here that the contrast with Polybius is greatest.

at the expense of the other virtues – justice, wisdom, and temperance (Pl. *Leg.* 3.696b–e). Without cultivating all of the virtues, a regime that relies on institutional checks and balances is inadequate. It does not promote a life well-lived or a regime well-governed.

¹²¹ For “concord” as the goal of Plato's mixed constitution, see Bobonich (2002) 427.

¹²² For further discussion of this important passage, see Perelli (1972); Girardet (1977) esp. 187–91; Kohns (1977); Büchner (1984) 236; Ferrary (1984) 94–9; and Zetzel (1995) 213–14.

¹²³ See Augustine, *De civ. D.* 2.21 and Adams, *A Defence of the Constitutions of Government of the United States of America*, 1:xx.

There is virtually only one duty for the statesman, because in this one duty nearly all the rest are contained: that he should never stop educating and examining himself; that he should call others to imitate him; and that through the splendor of his soul and life he should present himself as a mirror to his fellow citizens. For as with playing stringed instruments or the pipes, and of course in choral singing, a certain degree of harmony must be maintained among different sounds (Trained ears are not able to tolerate it if this harmony is altered or becomes discordant.); and as this music, though made from the regulation of very different notes, becomes pleasing and harmonious, so too the state, through the rational regulation of the highest and lowest and the intermediate orders, sings harmoniously with the agreement of very different groups; for what is called harmony by musicians with respect to choral music is called concord (*concordia*) in the state – the tightest and best bond of security in every commonwealth. And that concord cannot exist at all without justice. (*Rep.* 2.69)

Scipio, then, has endorsed the fourth principle of the Platonic-Aristotelian framework. Concord and affection (*caritas*) are to be built into the structure of the constitution, rather than institutions to direct natural discord and maintain fear. Conflict is to be eliminated as counterproductive. Essential to this end is a political culture with an enduring connection to the customs and traditions of the past, which in turn serve as the well-spring from which citizens are continually educated and guided. The offices and guiding principles of the mixed constitution aim at the just regime given ideal circumstances, while at the same time accommodating human nature by adapting the form of the constitution to fit the characteristics of the people.

Rationalism and the mixed constitution

The mixed constitution is widely regarded as one of the ancient world's most important contributions to political thought. The deceptive simplicity of the concept and its familiarity as a key element in republican theory make it tempting to overlook its theoretical underpinnings. However, we have seen that Cicero convincingly shows that to do so would be a mistake, for the various accounts of the mixed regime in classical antiquity presuppose fundamental and not uncontroversial views about human nature, chance, and the capacity of the political scientist to engineer a regime according to rational principles. The illumination of these

latent presuppositions reveals the presence of two competing versions of the mixed constitution based on two mutually exclusive political sciences. Therefore, to speak of “the doctrine of the mixed constitution,”¹²⁴ “the mixed-government tradition,”¹²⁵ or “the theory of the mixed constitution”¹²⁶ is not only misleading but also tends to obscure the important philosophical differences in the thought of those who entertained this form of government.

For Cicero the chief representatives of the competing political sciences that governed the different theories of the mixed regime were, of course, Plato and Polybius. Both were, in a sense, rationalists. However, they were rationalists of different sorts, and the differences are significant, as Cicero expertly brings out.

Let’s start with Plato. As we have observed Scipio and his companions interact with Plato over the past two chapters, a particular and coherent reading of Plato’s political thought has emerged. Plato is a rationalist insofar as he views the rule of reason as prescriptive and substantive. Reason mandates a perfectly harmonious society in which individual desires, however common and powerful, are subordinated to the common good. Yet Plato the rationalist is also the great teacher of the limits of rational rule and the importance of accommodating chance and the characteristics of the people to be ruled. Cicero saw the limits of reason as illustrated by Socrates’ account of psychological and constitutional degeneration in *Republic* 8 and 9, which, as we have seen, Scipio depended upon heavily for his own account of constitutional change.¹²⁷ Accommodation to chance and contingency emerged for Cicero as the major theme of the *Laws*, as Plato turns to history and the mixed regime. Cicero’s *Republic* thus introduces us to a Plato who takes as his starting point the claims of reason; after considering the rule of reason in his *Republic*, he then introduces contingency as an important factor in his *Laws*, thereby relaxing reason’s reign even while continuing to hold it as normative.

¹²⁴ N. Wood (1988) 160. ¹²⁵ Richard (1994) 128.

¹²⁶ As in e.g., the title of von Fritz (1954): *The Theory of the Mixed Constitution in Antiquity*.

¹²⁷ See further Cic. *Div.* 2.6: “This I had learned from Plato and philosophy: there are certain natural alterations of commonwealths so that commonwealths are held now by aristocrats, now by the people, and at another time by a tyrant.”

Polybius' rationalism begins from the exact opposite starting point. He begins not with reason but with the passions and chance, which provide the raw data for the political scientist. The reason with which the statesman works is not prescriptive or substantive, but instrumental; it provides the foundation for the "technique" of politics. This term belongs to Oakeshott, who uses it while discussing Machiavelli's contribution to rationalism in politics.¹²⁸ Given the parallels between the political sciences of Polybius and Machiavelli, it is perhaps not surprising that much of Oakeshott's description of rationalism captures much that is central to the Greek historian's theory. For the rationalist, politics is a matter of problem-solving, which he goes about by assuming for himself "the character of the engineer, whose mind ... is controlled throughout by the appropriate technique."¹²⁹ The rationalist "waits upon circumstance to provide him with his problems, but rejects its aid in their solution."¹³⁰ Consequently, his political science has no place for "a 'best in the circumstances', only a place for 'the best', because the function of reason is precisely to surmount circumstances."¹³¹ Ironically, Polybian rationalism, which began by rejecting Plato's utopianism, turns out to be far more impatient with chance and circumstance – and in this sense more "utopian" – than the Platonic rationalism it sought to supplant.

This second kind of rationalism has a long legacy. Polybius stands at the head of a powerful tradition of thinking about the mixed constitution, which runs through Machiavelli to Madison and is based upon the following shared assumption: given a certain insight into human nature and motivation, namely, that human beings are invariably rationally self-interested actors, by keeping political powers separate one may construct a political order that depends neither on human virtue nor on fortune. Given appropriate knowledge, "private vices by the dexterous management of a skillful politician may be turned into public benefits," as Bernard Mandeville infamously noted early in the eighteenth century.¹³² This belief was well expressed by John Adams in his *A Defence of the Constitutions of Government of the United States of America*.

¹²⁸ Oakeshott (1962) 24–5. ¹²⁹ Oakeshott (1962) 4.

¹³⁰ Oakeshott (1962) 5. ¹³¹ Oakeshott (1962) 5.

¹³² Quoted in D. W. Howe (2009) 101.

In this lengthy defense of the concept of the mixed constitution, which one historian has called “the finest fruit of the American Enlightenment,”¹³³ Adams remarks:

The best republics will be virtuous, and have been so; but we may hazard a conjecture, that the virtues have been the effect of the well-ordered constitution, rather than the cause: and perhaps it would be impossible to prove, that a republic cannot exist even among highwaymen, by setting one rogue to watch another; and the knaves themselves may, in time, be made honest men by the struggle.¹³⁴

Cicero’s treatment of constitutional change and the mixed constitution draws on Platonic rationalism to critique Polybian rationalism. Scipio’s return to Plato’s starting point – the ideal regime under the rule of reason – suggests an interesting possibility: has Polybius’ refusal to consider men as they hope to be caused him to misunderstand men as they are?¹³⁵ At any rate, on Scipio’s account his predecessor’s misunderstanding of human nature has caused the Polybian rationalist to miscalculate the importance of chance, history, and education, and to embrace the fallacy that virtue is a product of institutional engineering. Given the line of argument adopted by Scipio, somewhat paradoxically the *constitution* (understood as the institutional arrangement of offices) of the mixed constitution becomes less important. As in Thomas Jefferson’s thought, roughly 1,900 years later, the institutional elements of the mixed regime become subordinate to education, virtuous leadership, wise guidance, and the formation of character.¹³⁶

While Scipio’s account of the mixed constitution and the science of politics upon which it is based owes a great debt to Platonic rationalism, we have also seen how he has supplemented Plato’s teaching with insights from Roman history and tradition – in particular, the uniquely Roman concept of *auctoritas*

¹³³ G. S. Wood (2006) 178.

¹³⁴ Adams, *A Defence of the Constitutions of Government of the United States of America* 3 :505. For similar sentiments, see Kant’s essay “Perpetual peace” in *Kant: Political Writings*, esp. 112–13.

¹³⁵ We will return to this thought in the book’s conclusion.

¹³⁶ As Jean M. Yarbrough points out, even at his most democratic moments Jefferson supported a form of mixed regime: Yarbrough (2000) 78 n. 31. For Jefferson’s views on education and virtue, see Yarbrough (1998) 102–52.

which facilitated the education and guidance central to the Roman regime. Does Scipio make further use of Roman resources? In [Chapter 4](#) we shall follow him as he entertains an additional set of questions: given the limitations of rational rule, what constraints are to be placed upon rulers? What social bond unites citizens in political society? How are we to conceive of political society in the first place? In the process of raising and answering each of these related questions, he will exploit Roman history and political and legal resources in creative and important ways.

CHAPTER 4

POLITICAL SOCIETY AND
CITIZENS' RIGHTS

In his great textbook on rhetoric, *Institutes of Oratory*, Quintilian famously referred to Cicero as the “counterpart” or “imitator” of Plato (*Platonis aemulus*).¹ Thus far, our study of *De republica* has lent credence to this assertion. The first chapter argued that Cicero’s *Republic* is a fundamentally Platonic dialogue; the previous two chapters have revealed a philosophy with a decidedly Platonic flavor. Like Plato, Scipio and his companions have uncovered the important political principle that both reason and rational rule have limits. And on the basis of this principle they have followed Plato by turning towards the mixed constitution as the best practicable alternative. These findings should come as no surprise; the specter of Plato haunts the conversation of *De republica*.

But if the group of friends gathered at Scipio’s estate can never quite free themselves from the shadow of Plato, neither can they seem to put aside the conviction that Rome has something new to bring to political philosophy. Scipio perhaps most directly speaks to this tension in Book 1. His reading of the greatest and wisest of the Greek philosophers in the area of political philosophy has left him somewhat dissatisfied. However, he lacks the boldness to elevate his own opinions completely above theirs (*Rep.* 1.36). An uneasy question lies beneath much of the conversation of *De republica*: “How can a Roman statesman, however learned, compete with a Greek philosopher?” This question no doubt carries the subtext “How can a Cicero compete with a Plato?”

How *can* Cicero compete with Plato and Aristotle? Does *De republica* make any significant contribution to the history of political thought that was not already developed by Plato, Aristotle,

¹ Quint. *Inst.* 10.1.123.

or the Stoics? If so, what resources enabled Cicero to make his original contribution to political philosophy? With these questions in mind, let's now turn to the subject of this chapter: the definition and analysis of political society that Scipio provides in Books 1 and 3 of the *Republic*. As it turns out, Cicero's analysis of political society, which turns on Scipio's definition of *res publica*, is original in consequence of his deployment of Roman legal and political concepts such as *res*, *ius*, *libertas*, *potestas*, and *societas*. Scipio manipulates these concepts to present a different account of political society than that found in Plato or Aristotle, an account that incorporates a conception of citizens' rights into his theory of political society.

Rights in Roman law and political thought

In his 1819 lecture "The Liberty of the Ancients Compared with that of the Moderns", Benjamin Constant asserts that one of the chief differences between the two involves the concept of rights. The moderns have it, the ancients did not.² Constant's position continues to have traction. In *After Virtue* Alasdair MacIntyre proclaims: "There is no expression in any ancient or medieval language correctly translated by our expression 'a right' until near the close of the middle ages: the concept lacks any means of expression in Hebrew, Greek, Latin, or Arabic, classical or medieval, before about 1400, let alone in Old English or in Japanese even as late as the mid-nineteenth century."³ The view that medieval Latin lacked the means of expressing the concept of rights has received a stiff challenge.⁴ But political theorists and historians of political thought remain more or less united in the view that the ancient world did not develop the concept of rights. Rather, having located a "watershed" somewhere between Aquinas and Suarez, between the thirteenth century and the seventeenth,⁵ scholars have proposed a variety of candidates for the source of the concept of rights: the medieval canon lawyers,⁶ the nominalism of Ockham,⁷

² See Constant, *Political Writings*, 312. ³ MacIntyre (1981) 67.

⁴ Tierney (1997). ⁵ See Finnis (1980) 206–7.

⁶ Tierney (1997) 43–77. ⁷ See Villey (1953–4) and Villey (1964).

the individualism of seventeenth- and eighteen-century thinkers,⁸ or a combination of the last two options.⁹

Why is it the case that, according to the prevailing accounts of the origin of the concept, when found in the writings of Hobbes or Ockham one can translate the word "*ius*" as "a right," whereas in Cicero or the Roman jurists such a rendering is forbidden? The key is the association of *ius* and *potestas*, of right and power, in the thought of the supposed innovators. So of Ockham's definition of a right (*ius*) as a licit power (*potestas licita*) to act or use an external object,¹⁰ Michel Villey writes that "the concept of right" is "resolutely twisted to the meaning of a power."¹¹ And with respect to Hobbes, Leo Strauss argues that "there is a term that expresses in the most condensed form the result of the change which Hobbes has effected. That term is 'power.'"¹² He goes on to argue that for Hobbes power or *potestas* indicates *ius* or *dominium*. In this respect it is identical to a right: "the *potestas* or, more generally expressed, the right of a man, is what a man *may* do."¹³ Thus, it is precisely the conjunction of right and power, *ius* and *potestas*, which characterized the innovations of Hobbes and Ockham. This association of rights and powers also appeared frequently in the work of John Locke, who, as Ruth Grant points out, "often uses 'right' and 'power' ... interchangeably."¹⁴

In contrast to Ockham, Hobbes, and Locke, so the common account goes, the ancients did not understand rights as powers. Therefore, the ancient world in general, and the Romans in particular, lacked the concept of rights. As A.-J. Arnaud flatly states: "Classical Romans never recognized either private property rights

⁸ See Strauss (1965) 166–202, esp. 182.

⁹ Gillespie (2008) traces the individualism of the seventeenth and eighteenth centuries to the nominalism of Ockham.

¹⁰ See William of Ockham, *Opus nonaginta dierum* 2.155–8.

¹¹ Villey (1964) 117. ¹² Strauss (1965) 194.

¹³ Strauss (1965) 195; emphasis in the original. See also Hobbes, *Leviathan* 1.14: "THE RIGHT OF NATURE, which Writers commonly call *Jus Naturale*, is the Liberty each man hath, to use his own power, as he will himselfe, for the preservation of his own Nature."

¹⁴ Grant (1987) 67 n. 20. Of the texts from Locke's *Second Treatise* listed by Grant, see especially paragraphs 31, 83, 85, 87, 135, 149, 159, 163. At paragraph 3 Locke defines political power as "*a Right of making Laws with Penalties of Death*" (emphasis in the original).

or the concept of subjective right, which assumed the association of power and right.”¹⁵

What is the significance of this association of power and right? For Arnaud and other followers of the influential legal philosopher Michel Villey, the new association introduces a different conception of justice from the traditional Platonic/Aristotelian understanding of justice as right order. Justice, or right in the “objective” sense, denotes what is due to a person according to an objective rational and orderly scheme. To speak of right objectively is to speak of what is equitable. To conceive of a right as a power, as a “subjective right,” is to shift the focus to the individual.¹⁶ A right in this sense designates the capacity to act in a certain way. One has a claim to a good or action because one has a right to it rather than because it is objectively right.¹⁷

This distinction between objective and subjective right is not without problems. First, these categories give the impression that the notions of justice in question are rigid alternatives, whereas in actuality the conceptions admit of some fluidity. It is a relatively short distance between claiming “I deserve this because it is right” and claiming “I have a right to this.” Moreover, the term “subjective right” carries different connotations for different contemporary scholars. Some have used the term to designate the correlative of a duty to perform an action that is objectively right,¹⁸ while others have taken it to indicate a right that is inherent in the individual by virtue of being a human subject and, as such, synonymous with a human right.¹⁹ For these reasons, I will not employ the categories of objective and subjective rights in this chapter. Still, once we remove the troublesome designations “objective” and “subjective,” we find that the above account does adequately draw out the implications of the association of right and power. To have a power in this sense is to have the capacity to take some

¹⁵ Arnaud (1973) 181.

¹⁶ See Villey (1946) 201: “The notion of subjective right today plays a fundamental role in our legal thought. Coming from a very individualistic civilization, we tend to think of right in terms of the individual.”

¹⁷ See Dagger (1989) 294 for this formulation. On Villey’s telling, the story of the transition from the Aristotelian understanding of right as “right order” to the notion of “subjective right” is one of decline. His slogan: “Back to Aristotle!” (Villey (1961) 27).

¹⁸ See Wolterstorff (2007) 241–63. ¹⁹ Garnsey (2007) 181–2.

action or enjoy some good, which in turn entails the possession of a legitimate claim to this good or action. That is, to have a right conceived as a power or capacity to possess a good entails a claim against others not to be deprived of this good.²⁰

Did the Romans possess the concept of rights outlined above? Despite the frequent assertions to the contrary, they did. In fact, there is an abundance of evidence to suggest that the concept of rights was an integral part of Roman law and politics. For example, Charles Donahue, Jr. has collected 294 instances from Justinian's *Digest* in which the word *ius* indicates a right.²¹ And, as Peter Garnsey has noted, the conjunction of *ius* and *potestas* is sometimes found in Roman law.²² This is not the place to engage in an exhaustive and systematic examination of the evidence for rights language in Roman texts. For now, a brief survey will have to suffice.

First, one should notice that there are numerous places in classical Latin texts where *ius* can, and indeed should, be translated by our expression "a right." Consider property law. Two of the ways in which Roman civil law specified rights of ownership involved usufructs and servitudes. The *Digest* defines a usufruct as "the right to use and enjoy the things of another (*ius alienis rebus utendi fruendi*) without impairing their substance."²³ That is to say, the possessor of a usufruct is entitled to enjoy certain fruits of a property even though he is not the owner. As the definition of a usufruct suggests, jurists frequently used rights language to describe the benefits to which the usufructuary (someone who has

²⁰ Readers familiar with W. N. Hohfeld's widely accepted analysis of rights in *Fundamental Legal Conceptions* may object that the above account too closely connects rights as claims with rights as powers. According to Hohfeld (1919) 36, a right understood as a claim differs from a right understood as a power and, even though the English term "right" covers both ideas (as well as liberties and immunities), only a right understood as a claim is "a right in the strictest sense." However, even though a power may not be identical to a claim, having a licit power to act entails having a claim to be free to so act. Taking Hohfeld's paradigmatic example of a power, the capacity of a judge to alter the legal status of another, Wolterstorff (2007) 254 explains: "The power the judge has to pronounce sentence is a capacity that comes with his status of judge; it is an essential component of that status. I, not having the status of judge, do not have that capacity. Given his power, his capacity, to pronounce sentence, the judge is now permitted to exercise that power in certain ways, and has the claim-right to be free to do so."

²¹ See Donahue (2001). ²² Garnsey (2007) 190–2.

²³ *Dig.* 7.1.1 (trans. Watson).

rights to use a property but does not own it) is and is not entitled. For example:

When a *bonae fidei* possessor acquires possession of a slave through use over a period of time, because he becomes the owner in this way, he is able to acquire things for himself through him [the slave] on any grounds whatsoever. But the usufructuary is not able to acquire possession of the slave through duration of use ... because he does not own the slave, but only holds the right to use him and enjoy him (*habet ius utendi fruendi*).²⁴

Laws regarding servitudes make even more extensive use of rights language. A servitude is “a burden on property obliging the owner to allow someone else to use it for some purpose – or preventing the owner from using it in a way that inconveniences another person. The property thus burdened is the servient property.”²⁵ The jurists of the classical period distinguished between rustic praedial servitudes (*iura praediorum rusticorum*) and urban servitudes (*iura praediorum urbanorum*), depending on whether the servitude served an agricultural or urban purpose.²⁶ Rustic praedial servitudes included *iter*, *actus*, *via*, and *aquae ductus*. The jurists understood each of these as a right. Hence, *iter* is “the right permitting a man to go on foot and to walk” (*ius eundi ambulandi homini*); *actus* is “the right to drive either a beast of burden or a vehicle” (*ius agendi vel iumentum vel vehiculum*); *via* is “the right to go on foot, to drive, and to walk” (*ius eundi et agendi et ambulandi*); and *aquae ductus* is “the right to channel water across another’s land” (*ius aquam ducendi per fundum alienum*).²⁷ Urban servitudes likewise involve the language of rights.²⁸

In the realm of constitutional law, the Romans used *ius* to designate a right construed as the exercise of a capacity for acting which the holder of an office possesses. In fact, Cicero himself provides an excellent example in *De legibus*.

²⁴ *Dig.* 41.1.10. ²⁵ Garnsey (2007) 186. ²⁶ See Kaser (1968) 118–21.

²⁷ *Dig.* 8.3.1 pr. (trans. Watson).

²⁸ See *Dig.* 8.2.2, 8.2.4, 8.2.6 and Gaius, *Inst.* 2.14. Michel Villey cites the provision of a “right to not build higher” (*ius ... non extollendi (altius)*) in *Dig.* 8.2.2 (= Gaius, *Provincial Edict Book* 7) and Gaius, *Inst.* 2.14, as evidence that the Romans did not understand rights in our sense, that is, as involving powers: Villey (1946) 217; Villey (1953–4) 171; and Villey (1962) 182. For two good discussions of these passages, which show that Villey has misconstrued this provision, see Kaser (1968) 119 and Garnsey (2007) 187.

But if there is anything outside the scope of the magistrates that needs to be attended to, let the people create someone to attend to it and grant him the right to do so (*ius coerandi*). Let the consul, praetor, the master of the people and the cavalry, and the one whom the senate selects to offer consuls [to the people] for election all possess the right to address (*ius agendi*) the people and the senate. Let the tribunes whom the plebs has created for itself have the right to address (*ius agendi*) the senate. Likewise let the tribunes bring to the plebs whatever will be necessary. (*Leg.* 3.10)

Finally, the Romans conceived of citizen status in terms of rights. To obtain citizenship is “to acquire the right of citizens” (*adipisci ius Quiritium*).²⁹ The right of Roman citizenship in turn entails a number of citizens’ rights. The most important of these include the right of marriage (*conubium*; *ius connubii*) and the right of appeal (*provocatio*; *ius provocationis*). Both of these rights date to early in the history of the Roman Republic.³⁰

Not only did the Romans have the vocabulary for rights, but like moderns they also associated rights and powers. For instance, in the Latin version of *De cive*, Hobbes writes: “Therefore by the right of nature (*iure naturae*) the right of ownership (*dominium*) of an infant belongs at first to him who first holds it in his own power (*in potestate sua*).” He continues: “However, it is clear that he who is just born is in the power (*in potestate*) of his mother before he is in the power of anyone else, so that she may either educate him or abandon him according to her own will and right (*iure*).”³¹ Compare the following discussion of slavery by the Roman jurist Gaius: “Slaves are in the power (*in potestate*) of their masters (*dominorum*) ... If the cruelty of the masters seems intolerable they are compelled to sell their slaves ... for we ought not to use our right (*nostro iure*) badly.”³² Brian Tierney observes: “It is hard

²⁹ See Gaius, *Inst.* 1.32b for this formulation.

³⁰ For *ius connubii* or *conubium*, see Livy, *Ab urbe condita* 4.1–6, which describes how the plebeians received the right to intermarry with patricians. Note the many references to the respective “rights” (*ius, iura*) of the patricians and plebeians in context (e.g., 4.1.2, 4.2.14, 4.3.9, 4.4.4, 4.4.11). For the term *ius provocationis*, see Florus, *Epitoma de Tito Livio* 1.16.8 and, for the concept, see Livy 1.26.6, 2.8.2, 2.55.5–7, 3.36.4–6, 3.45.8, 3.48.9, 3.53.4–57.6, 4.13.11–12, 10.9.4–6 (among other passages). See also Cic. *Rep.* 2.53–4.

³¹ Hobbes, *De cive* IX.2: *iure igitur naturae Dominium infantis ad eum primum pertinet, qui primus in potestate sua ipsum habet. Manifestum autem est eum qui modo nascitur, prius esse in potestate matris, quam cuiusquam alterius, ita ut illum vel educare, vel exponere, suo arbitrio & iure possit.* Cf. Hobbes, *Leviathan* XX.5.

³² Gaius, *Inst.* 1.53 (trans. Tierney (1997) 17).

not to see here an assertion of the subjective *right* of the master consisting in his *power* over the slave who was under his *dominium*.”³³ Indeed. Just like Hobbes, Gaius associates right, power, and ownership – *ius*, *potestas*, and *dominium*.

The association of rights and powers in Roman law was neither infrequent nor merely of incidental importance. The jurists employed the concept to explain important aspects of Roman law, such as the extraordinary authority that the father had over his family: “Likewise our children whom we have created in civil marriage are in our power (*in potestate*). This right (*ius*) is distinctive of Roman citizens. For there are virtually no other men who have such power (*potestatem*) over their sons as we have.”³⁴ When there was no one available to exercise paternal power, Roman law created a guardianship (*tutela*) for anyone who was too young to be *sui iuris*. Justinian’s *Institutes* defines a tutelage as follows: “A tutelage (*tutela*) is, as Servius defined it, the right (*ius*) and power (*potestas*) granted and entrusted by the civil law over a free person for the protection of someone who is unable to defend himself of his own accord on account of his age.”³⁵ In other contexts where *ius* denotes a right, the expression “right and power” (*ius potestaque*) appears to have been used as a formula for the concept.³⁶

Roman historians also associated *ius* and *potestas*. Take for example the account of the Catilinarian conspiracy by the Roman historian (and Cicero’s younger contemporary) Sallust. Roughly halfway through his account, Sallust describes the so-called *senatus consultum ultimum*, “the final decree of the senate,” which grants the consuls the power to take action to protect the *res publica* from harm.

This power (*potestas*) according to Roman custom is the greatest entrusted to a magistrate by the senate: to prepare the army, to wage war, to control the allies and citizens by all methods, to exercise supreme command and jurisdiction at home and at war. Otherwise, without the command of the people, the consul has the right (*ius*) to do none of these things.³⁷

³³ Tierney (1997) 17. ³⁴ Gaius, *Inst.* 1.55.

³⁵ Just. *Inst.* 1.13. See also Horace, *Sermones* 2.3.217–18: *interdicto huic omne adimat ius praetor; et ad sanos abeat tutela propinquos*. “Placing him under injunction, the praetor would remove all his rights, and would send guardianship to mentally sound relatives.”

³⁶ See e.g., *Dig.* 28.8.1, 35.2.1 and Frontinus, *De aquaeductu urbis Romae* 129.9.

³⁷ Sall. *Cat.* 29.

Sallust uses power and right, *potestas* and *ius*, as synonyms. Indeed, one could easily translate *ius* as power. For a consul to possess the *ius* to undertake the various actions specified by the *senatus consultum ultimum* is for him to possess the power to do so.³⁸

Not only did Romans associate *ius* with power, but one can also identify in Roman political speech a matrix of terms consisting of *libertas*, *ius*, and *potestas* – liberty, right, and power. Again, Cicero provides a ready example. In a speech delivered in the senate against the tribune Publius Servilius Rullus, he argues: “Kings are being set up, Romans (*Quirites*), and not decemvirs. And from this beginning and foundation they arise so that not only when they have begun to hold office, but also from the very moment of their selection, all of your rights (*ius*), powers (*potestas*), and liberties (*libertas*) are removed.”³⁹

We find, then, in the law and political discourse of both the Roman Republic and the Empire the presence of the concept of rights and a vocabulary with which to express it. Furthermore, Cicero himself was quite familiar with rights discourse. In *De republica* Scipio utilizes this discourse in the course of presenting his account of political society.

Rights and the “property of the people”

Scipio first airs his definition of *res publica* at *Rep.* 1.39. It is arguably the most famous definition from antiquity. Augustine engaged with it in the second and nineteenth books of his *City of God* in the early fifth century and it continues to be a frequent topic of scholarly discussion. The bibliography is massive. Much of this ink has been spilt attempting to identify the definition’s Greek sources. From these studies the Stoic Panaetius and, more

³⁸ See also Livy 5.11.5.

³⁹ Cic. *Leg. agr.* 2.29. Pliny the Younger similarly uses *ius* as a synonym for a power or liberty at *Epistula* 8.14.6: *Quae potestas referentibus, quod censentibus ius, quae vis magistratibus, quae ceteris libertas ... exemplis docebantur.* “What power exists for those bringing cases, what rights exist for those offering opinions, what influence exists for magistrates, what liberty exists for the rest ... were taught by examples.”

recently, Aristotle have emerged as the leading candidates.⁴⁰ At the same time, there has been a growing sense among scholars that there is something original and distinctively Roman about Scipio’s definition and analysis of *res publica*⁴¹ – even among some of those who hold that he formally follows an Aristotelian framework.⁴²

The dialogue raises the possibility that the subsequent analysis will draw upon Roman material even before Scipio formally introduces the definition. He had been asked to explain his ideas about the best way of organizing the state (*civitas*) by Laelius (*Rep.* 1.33–4), a topic of immediate importance since the reforms of the Gracchi had caused division in the state, resulting in “a single state [with] two senates and nearly two peoples” (*Rep.* 1.31). Upon accepting the assignment, Scipio immediately gives his conversation partners a clue about how he will proceed and from what sources he will draw his information.

Accordingly, I desire that you listen to me in the following manner: as someone neither completely unacquainted with Greek ideas nor preferring them to our own, particularly on this topic. Rather, I ask that you listen to me as a member of the toga-wearing party, not badly educated due to the diligence of his father and kindled from childhood with a desire for learning. Nevertheless, I was educated by experience and domestic precepts to a far greater extent than by books. (*Rep.* 1.36)

According to Scipio’s own instructions for interpreting his teaching, Roman practice and political experience will shape the account of political society that he is about to present. Though he is knowledgeable of Greek political philosophy, Scipio suggests that his hearers will misunderstand his teaching if they neglect the fact that they are being taught by a Roman rather than a Greek.⁴³

⁴⁰ For Panaetius or another Stoic as the source, see e.g., Schmekel (1892) 61–74; Pohlenz (1934) 32–3, 46–7; and Pohlenz (1970–2) 1:202–7. For Aristotle as the source, see Stark (1954); Werner (1973); and Asmis (2004) esp. 592–7. Such studies have prepared the way for the further question of whether Scipio’s theoretical treatment of political society is broadly Aristotelian (see e.g., D. Frede (1989) and Asmis (2004) 592–7).

⁴¹ See e.g., Kohns (1974); N. Wood (1988) 120–42; and Schofield (1995).

⁴² So Werner (1973) and Asmis (2004).

⁴³ One should not, however, construe Scipio’s emphasis on the contribution of Roman precepts and experience to imply the absence of theoretical analysis and philosophical rigor, as does Kohns (1976) 213, who contends that the “philosophical elements are only window dressing.”

Scipio proposes to begin the investigation by offering a definition. Some scholars have supposed that the very decision to begin his discussion of *res publica* with a definition indicates that he is explicitly following Aristotle's framework.⁴⁴ However, Scipio's introduction to his methodology at this point is more reminiscent of Socrates' philosophical method. Just as Socrates often compared political expertise to the knowledge of craftsmen, so Scipio begins by comparing his dedication to mastering the "craft" (*ars*) of politics to the single-minded devotion that the artisan (*artifex*) and craftsman (*opifex*) apply to their particular crafts (*Rep.* 1.35). And in classical Socratic fashion, Scipio suggests that they must begin with a definition because it is impossible to understand what sort of thing (*quale*) a *res publica* is without first understanding what (*quid*) it is (*Rep.* 1.38). He claims that this particular approach sets him apart from those thinkers who began their investigations of political society by tracing its development from the first union of male and female (*Rep.* 1.38). Though Scipio mentions no particular writers by name, he presumably has in mind such accounts as found in Aristotle's *Politics* (1.2.1252a24–31) of which Cicero's first-hand knowledge is disputed,⁴⁵ and Polybius' *Histories* (6.6.2), which Cicero almost certainly had read.

Having concluded this important introductory conversation, Scipio offers his definition of a *res publica*:

Well then, states Africanus, a *res publica* is the property of the people (*res populi*). However, a people (*populus*) is not any gathering (*coetus*) of human beings assembled in any way at all, but a gathering of a critical mass united in a partnership (*sociatus*) by an agreement about law/justice/rights (*iuris consensu*) and by commonality of advantage (*utilitatis communione*). (*Rep.* 1.39)

⁴⁴ So Asmis (2004) 595.

⁴⁵ In a note on *Rep.* 1.38, George Sabine suggests that Scipio may be referring to Aristotle's *Politics* 1252a24ff.: Sabine and Smith (1976) 129 n. 63. On the other hand, Dorothea Frede argues that Cicero did not have first-hand knowledge of Aristotle's *Politics*: D. Frede (1989) 81. My own account does not require us to suppose that Cicero had himself read Aristotle's *Politics*. However, in setting forth his own definition of *res publica* Cicero does seem at times to be responding to some of Aristotle's ideas in *Politics* 3, the one book of the *Politics* that appears to have had a considerable influence on Hellenistic political thought (see Aalders (1975) 38 n. 127). D. Frede (1989) 97 n. 43 speculates that Aristotle may have based *Politics* 3 on one of his own exoteric writings that enjoyed wide circulation. Cicero could have gleaned Aristotle's basic ideas from this work or from the writings of later Peripatetics.

At first glance, Scipio’s definition of *res publica* appears to have much in common with Aristotle’s definition of *polis* in *Politics* 3. First, both definitions have two components.⁴⁶ The first part of Scipio’s definition establishes that the *res publica* is the “property” (*res*) of the people, while the second unpacks what constitutes a people. Likewise, Aristotle defines a *polis* as “a certain multitude (πληθός) of citizens (πολιτῶν)”⁴⁷ before further defining a citizen as one who “shares in the administration of justice (κρίσεως) and in rule (ἄρχῃς).”⁴⁸ Second, just as Scipio specified that a people is united in agreement about law/justice/rights (*ius*) and commonality of advantage (*utilitas*), so Aristotle defined the political good (πολιτικὸν ἀγαθόν) as “justice (τὸ δίκαιον) which is the common advantage (τὸ κοινῇ συμφέρον).”⁴⁹ However, despite these apparent similarities with Aristotle’s definition, Scipio’s definition will result in a very different account of political society, which in turn leads him to raise a question about regimes with which Aristotle was not concerned. The reason for this difference lies in the fact that both parts of Scipio’s definition involve metaphors drawn from Roman law which work together to establish a distinctive view of political society.

Scipio’s suggestion that a *res publica* is the *res* or property of the people plays on the use of *res* in Roman law to designate property. Scipio conceives of this property metaphorically to represent the interests and affairs of the people.⁵⁰ Why conceive of *res* as property and *res publica* as the property of the people? There are at least three reasons for doing so. First, it is consistent with the way Cicero’s contemporaries, and indeed Cicero himself, conceived of the *res publica*. For instance, Sallust distinguishes the *res publica* as a public entity from the *civitas* as a collection of governing men. “But when the *civitas* was corrupted, the *res publica*, on the other hand, continued to sustain the vices of generals and magistrates by its own greatness.”⁵¹ Sallust’s use of the terms implies the following distinction: a *civitas* is reducible to

⁴⁶ See Asmis (2004) 593. ⁴⁷ Arist. *Pol.* 3.1.1274b41.

⁴⁸ Arist. *Pol.* 3.1.1275a23. ⁴⁹ Arist. *Pol.* 3.12.1282b17–18.

⁵⁰ For *res* as property, see N. Wood (1988) 125–6. For property as a metaphor, see Schofield (1995) 75–6.

⁵¹ Sall. *Cat.* 53.

the citizens who constitute it in a way that a *res publica* is not. The *civitas* became immediately corrupted due to the failings of the magistrates because *civitas* in the first instance refers to an association of men for the purpose of ruling. For the leaders to fall into corruption is precisely for the *civitas* to fall into corruption. The *res publica*, however, is able to remain unaffected by the vices of its leaders (at least in the short term) because as an object it is immune from moral corruption.⁵²

Cicero himself likewise conceives of the *res publica* as public property in contradistinction to the *civitas* – an association of citizens for the purpose of rule – in *Pro Sestio*, a speech delivered in 56 BC, just a few years before he would begin work on *De republica* in earnest. In an excursus on the formation of political society, Cicero states the following: “Then the property relating to the common advantage (*res ad communem utilitatem*), which we call public (*publicas*), then the associations of men (*conventicula hominum*), which later were called states (*civitates*), then the joining of houses, which we call cities (*urbes*) – all were enclosed by walls when the divine and human law (*divino iure et humano*) had been discovered.”⁵³ Here *res publica* is glossed as “the property relating to the common advantage” or, as Robert Kaster translates the phrase, “the possessions and activities that bear on the common advantage.”⁵⁴ These definitions anticipate Scipio’s definition in *De republica* in several significant ways, not least by specifying that the presence of law (*ius*) and concern for the common advantage (*utilitas*) are necessary conditions for the existence of political society. Given the similarities and proximity in date of composition, it is reasonable to conclude that *De republica* no less than *Pro Sestio* presents *res* in terms of property.

Second, throughout his discussion of *res publica* in *De republica*, Scipio conceives of *res* as something that belongs to the people (*res populi*). He places much emphasis on the genitive of possession. In fact, the construction is found at eight places in the dialogue, four each in Books 1 and 3 (*Rep.* 1.39, 41, 43, 48; 3.35 = 3.43, 44, 45; 3.36 = 3.46). Its constant presence reinforces the idea that *res* is the object of ownership, that is to say, property.

⁵² See Drexler (1958) 4. ⁵³ *Cic. Sest.* 91. ⁵⁴ Kaster (2006) 81.

Finally, and perhaps most importantly, Scipio’s conception of *res* as property plays on the way in which the term is used in Roman law. This becomes abundantly clear in Book 3 when Scipio returns to the Book 1 definition: “When the decemvirs ruled at Rome without the right of appeal ... there was no property of the people (*populi nulla res erat*); indeed, the people had to take action (*id ... egit*) to recover its own property (*ut rem suam recuperaret*)” (*Rep.* 3.35 = 3.44–5). Scipio’s formulation utilizes the legal language of an *actio* or lawsuit which one undertakes to recover (*recuperare*) possession of one’s property (*rei possessionem*).⁵⁵ Scipio’s interlocutor Laelius continues to employ legal vocabulary to extend this conception of the *res publica* as property later in this same section. Commenting on mob rule, he observes: “Nor is it fitting, when the goods of madmen by law are placed in the power (*in potestate*) of their relatives, that then their ...” The manuscript breaks off, unfortunately, but apparently Laelius’ point is that just as by law a madman must give up power over his property and place it in the power of his relatives, so a democracy mad with power should give up power over its property (*res publica*) and entrust it to others.⁵⁶ This is strong evidence that the characters in *De republica* are operating under the assumption that the *res publica* is a type of property.

It seems, though, that when Scipio and his interlocutors speak of property, they are using the term in a metaphorical sense to encompass “the public interest, public affairs and public wealth.”⁵⁷ The people have a claim to interests and advantages that are rightfully theirs. That these interests may extend beyond property is suggested by Cicero’s own enumeration of the constitutive parts of the happy life enjoyed by citizens. It is a life “stable in wealth, rich in resources, filled with glory, honorable in virtue” (*Rep.* 5.2 = 5.8). But why should the citizens have a claim to manage their interests, affairs, and wealth? This will become clear from an examination of the second component of Scipio’s definition.

Just as Scipio understood *res publica* in a specific sense, as the “property of the people,” so too does he have a specific

⁵⁵ See e.g., Gaius, *Inst.* 4.154. ⁵⁶ See Schofield (1995) 75.

⁵⁷ Asmis (2004) 579.

understanding of what constitutes a people. A people is an association based on an agreement about *ius* and common advantage. Fundamental to this definition is the idea that a people is a *societas*, an association or partnership (*Rep.* 3.35 = 3.43).⁵⁸ Here, as was the case with “property,” he is drawing on a concept from Roman law.⁵⁹

According to Roman law, a partnership was a “*bonae fidei* contract whereby two or more persons agreed to associate in a common venture for their mutual benefit. Partnerships were often formed with a view to making a financial profit but this was not an essential requirement of the contract – the mutual benefit did not have to be pecuniary.”⁶⁰ The contracts were regulated by law, the *ius societatis*, and as such had to be lawful and compatible with good faith.⁶¹ Each partner had to contribute to the common venture or property, the *res communis*, in some way, whether financially or with his labor or expertise. There was no requirement that each partner contribute in the same way or in the same amount, but each person who contributed to the common venture had a right to some share in the benefits that resulted from the partnership. The size of each partner’s share was normally decided by the partners.⁶² There are several ways in which a partnership can end. It can be terminated by a serious injustice on behalf of one of the partners, and it ends if its subject matter has been exhausted, lost, or destroyed.⁶³

Scipio conceives of political society as a type of partnership, a cooperative enterprise undertaken for the common benefit of all its members. A people (*populus*) has partnered together (*sociatus*) in a common venture to manage a common property in which all members have an interest, the *res publica* or “the property of the people.” This partnership is to be for the common advantage (*utilitatis communio*) and is governed by an agreement with respect to law/justice/rights (*iuris consensus*).

⁵⁸ Scipio uses the participle *sociatus* rather than the noun, *societas*, in the original statement of the definition at *Cic. Rep.* 1.39.

⁵⁹ For the suggestion that Scipio’s definition employs *societas* in a special legal sense as a partnership, see Asmis (2004) 580–2 and Harries (2006) 24–5, 232.

⁶⁰ Borkowski (1994) 291. See also Metzger (1998) 162–5.

⁶¹ See *Dig.* 17.2.17. ⁶² See Borkowski (1994) 291.

⁶³ See *Dig.* 17.2.58.

It is time to say something about what Scipio means by agreement with respect to *ius*. I have thus far been under-translating the word, leaving three common meanings of the term in play. This most likely is consistent with Cicero’s intentions, for soon after the initial definition Scipio devotes part of his discussion to refining the way in which the term is to be construed. In the course of briefly pointing out the deficiencies of the three simple regimes – monarchy, aristocracy, and democracy – Scipio offers the following criticism: “But in monarchies the rest of the citizens possess an insufficient share of common rights (*iuris*) and deliberative capacity (*consili*), and in the rule of the best the multitude hardly has a share of liberty (*libertatis*), since it lacks all common deliberative capacity (*consilio*) and power (*potestate*)” (*Rep.* 1.43). The repetition of “deliberative capacity” (*consilium*) shows that monarchies and aristocracies fall short for the same reason: in each instance the people lacks the freedom, power, and right to deliberate over their common interests. Scipio has introduced *ius* into the same matrix of *potestas* and *libertas* that appears in Roman law and at various places in Cicero’s speeches.⁶⁴ As a result, the *ius* that the people lacks becomes virtually synonymous with a power or liberty, the classic definition of a right.

Scipio returns to this conception of a right at *Rep.* 1.48. Although he now is speaking from the partisan perspective of a democrat, his remarks here and at 1.49 make important contributions to his account of political society. Much as in *The Politics* Aristotle adopts for his important definition of a citizen a notion (ruling and being ruled in turn) that has clear affinities with the partisan democratic definition that he polled earlier,⁶⁵ Scipio’s definition of *res publica* incorporates some, though certainly not all, elements of the democratic position.

If indeed the people holds on to its own rights (*ius suum*), they deny that anything is more excellent, more free (*liberius*), more prosperous, since they are the masters (*domini*) of the laws and law courts, of war, peace, and treaties, of the civil rights and wealth of each citizen. They say that this alone is rightly called a *res publica*,

⁶⁴ For the similar connection between *ius*, *libertas*, and *potestas*, see Cicero, *De lege agraria* 2.29 and Pliny the Younger, *Epistula* 8.14.6.

⁶⁵ For Aristotle’s definition of a citizen, see *Pol.* 3.13.1283b42–1284a3. For the earlier democratic definition, see *Pol.* 3.1.1275a22–33, 1275b5–7.

that is, the property of the people. They say furthermore that it is customary for the property of the people to be emancipated (*in libertatem rem populi vindicari*) from the mastery of kings or aristocrats, and that neither kings nor the power (*potestatem*) and wealth of the few are sought from free peoples. (*Rep.* 1.48)

The conception of *ius* as a right introduced in the previous passage is reinforced here by the addition of the possessive adjective, which, along with the verb *tenere*, “to hold,” emphasizes that *ius* is a possession. Like the twenty-first-century reader of this book, Scipio and his interlocutors can talk about “having rights.” The expression that Scipio uses is a common way to indicate a right in Roman law.⁶⁶ And as in Roman law he introduces the language of rights into a matrix of ownership, freedom, and power. Finally, talk of the commonwealth being “emancipated” catches our attention. The phrase *in libertatem vindicare* (“to emancipate”) in Roman law indicated an action on behalf of a slave to gain his freedom. The expression *rem publicam in libertatem vindicare* (“to emancipate the commonwealth”) seems to have become a common political slogan,⁶⁷ and this may be how Scipio is using it here.⁶⁸ But the emphasis that Scipio places here on the people’s *ownership* of the commonwealth as “the property of the people” should remind us that *vindicatio* is an important term in the Roman law of property, where it is defined as the exercising of a right or power to place a claim on a property based on the ownership of the property in question.⁶⁹ In fact, Scipio will put this concept to good use in Book 3.

First, however, there is one final component of Scipio’s argument in this section of Book 1, which he introduces with the following rhetorical question: “And therefore, since law (*lex*) is the bond of a civil partnership (*civilis societatis vinculum*), and rights (*ius*) under law (*legis*) are equal (*aequale*), then by what right (*iure*) can a partnership (*societas*) of citizens be held together

⁶⁶ Donahue (2001) 509 has identified 103 places in the *Digest* alone where the possessive adjective or pronoun indicates that *ius* belongs to someone.

⁶⁷ See Wirszubski (1950) 103–4.

⁶⁸ So Zetzel (1995) 138.

⁶⁹ See *Dig.* 6.1.2 and 6.1.49. The latter passage reads (trans. Watson): “Whatever remains from my property which I have a right to vindicate is itself mine” (*Meum est, quod ex re mea superest, cuius vindicandi ius habeo*).

when the status (*condicio*) of citizens is not the same?"⁷⁰ Scipio concludes his argument:

Even if it is not suitable for wealth to be distributed equally, and if the natural mental capacities of all cannot be equal, certainly the rights (*iura*) of all those who are citizens (*cives*) in the same *res publica* ought to be equal (*paria*). For what is a state if not a partnership (*societas*) of citizens under law? (*Rep.* 1.49)

Scipio's argument utilizes both the conception of political society as an enterprise or partnership (*societas*) and the refined notion of *ius* as a right or power. His point is roughly as follows: Political society is a type of partnership or enterprise and, as such, governed by law which serves as its bond. The members of any such partnership must possess something in the same degree if the association is to be secure and enduring. While people differ with respect to natural qualities and wealth, their status under the law (*condicio*) can be the same. Thus, what members of the partnership share equally are their rights as citizens. These rights attach to the individuals as citizens and reflect their status as lawful members of the partnership, that is, of the *res publica*.

Scipio's unpacking of the second half of the definition of a *res publica* suggests why citizens have the right to manage their interests and affairs. In consequence of his conception of a political society as a type of lawful partnership or enterprise among citizens, each member of the society enjoys a certain standing within the partnership and a certain right to benefits from the common property. Having refined the meaning of *ius* until it clearly denotes a right, Scipio is able to use this language to bring out explicitly

⁷⁰ Cic. *Rep.* 1.49: *Quare cum lex sit civilis societatis vinculum, ius autem legis aequale, quo iure societas civium teneri potest, cum par non sit condicio civium?* The translation follows Zetzel (1999) with the exception of *societas*, which I have continued to translate as "partnership." The meaning of the Latin "*ius autem legis aequale*" may admit of some ambiguity. I have followed Zetzel (1999) in rendering these words "rights under law are equal." However, in his earlier commentary, Zetzel opts to translate the phrase as "right is equivalent to law" (Zetzel (1995) 139). Given the logic of the argument that follows, I think it likely that Zetzel (1999) is the correct translation. Indeed, Cicero had introduced a similar line of thought some fifteen years earlier in his speech *Pro Caecina*: "For when law is abolished there can be no means by which an individual can prove what is his own and what belongs to another. In this instance nothing will exist which is uniform among all and identical for everyone" (*aequabile inter omnes atque unum omnibus; Caecin.* 70). Here there can be little doubt as to Cicero's meaning: *ius* is important because it provides the one thing that is uniform and equal for everyone.

the idea that some scholars have supposed exists implicitly as a logical outcome of the property metaphor: the fact that the people own the *res publica* implies the right to manage this property.⁷¹

Citizens' rights

Thus far, I have argued that Scipio has incorporated a conception of rights into his theory of political society. Against whom are these rights held? What is their source?

From the modern point of view, the bearer of rights possesses claims not only against his fellow private citizens but also against the governing authorities. The rights that one possesses as a citizen serve as trumps or limitations on what the government may legitimately do. When we think of such rights, we think not only about those rights granted by the prevailing government; we also think of rights, which citizens possess as citizens, that make claims on the government and whose moral force the prevailing regime cannot abrogate. Thus, according to Annabel Brett, the "term 'right' ... involves of itself a reference to what we might term a 'zone of non-coincidence' between individuals and the positive legal order of the state."⁷² The concept of citizens' rights in particular assumes a zone of non-coincidence between individuals and governing authorities. Citizens must possess some rights that are not identical to the rights conferred by the prevailing ruling authority if they are to exercise claims against this authority.

Brett has argued that the Romans, Cicero included, lacked any such conception of citizens' rights. In early modern political thought, nature provided the grounding for the required non-conferred rights, which in turn provided the grounds for claims within the city. However, Brett is unable to find any instances in the writings of Cicero where citizens' rights are rooted in nature.

⁷¹ For the idea that the concept of rights is implicit in the notion of popular ownership of the *res publica*, see Schofield (1995) 76. For the logical point that the conception of ownership entails a conception of rights, see MacPherson (1978) 4: "For any given system of property is a system of rights of each person in relation to other persons. This is clearest in the case of modern private property, which is my right to exclude you from something, but it is equally true of any form of common property, which is the right of each individual not to be excluded from something."

⁷² Brett (2003) 98.

Thus she concludes that “the ancient figure of the citizen is not the bearer of rights in our sense.”⁷³

One will search Cicero's *Republic* in vain for an articulation of rights grounded in nature. However, Scipio's analysis of *res publica* clearly establishes non-coincidence between the rights that citizens possess as citizens and those conferred by the prevailing governing authority. It is his normative conception of political society that provides the space for the relevant zone of non-coincidence.

The key passage is found in Book 3 (*Rep.* 3.35 = 3.43–5). After Laelius and Philus have concluded their debate on the utility of justice to a commonwealth (see [Chapter 1](#)), Scipio reintroduces the definition of *res publica* from Book 1. He then examines instances of tyranny, oligarchy, and mob rule that deny popular ownership of the commonwealth. Scipio and his interlocutors decide that the logic of the argument compels them to conclude that in such cases there is not a bad commonwealth, but actually no commonwealth at all.

Throughout this section, Scipio and his companions reintroduce both the concept of a *res publica* as a partnership (*societas*) and the same matrix of concepts which denoted rights in the first book: *potestas* (four times); a genitive of possession construction involving *populus* (seven times); *libertas* (once); *ius* (twice). Scipio places particular emphasis on the concept of ownership throughout this section, which now seems to be shorthand for expressing the concept of citizens' rights developed in Book 1. Given this, Scipio most likely intends for the idea of property ownership to be metaphorical in a second sense. Not only does “the property of the people” stand for citizens' interests, concerns, and affairs,⁷⁴ but it also stands for their rights.⁷⁵

Consider the cases of tyranny (3.35 = 3.43) and oligarchy (3.35 = 3.44). In both instances the people owned nothing (*nihil enim populi*, “nothing belonged to the people” (3.35 = 3.43); *tota sit in factionis potestate*, “everything is in the power of a faction” (3.35 = 3.44)). If the language of ownership here entails a concern

⁷³ See Brett (2003) 97–9, with the quotation at 99.

⁷⁴ See Asmis (2004) 579. ⁷⁵ See Schofield (1995) 76.

with rights, then for Scipio to say that, for example, an oligarchy has everything in its power (*in potestate*) is for him to say that it has not recognized that the people possess any rights. In such a situation "liberty herself had been deprived of her rightful claims (*vindicias*)" (3.35 = 3.44). As in Book 1, Scipio's remarks call to mind the Roman legal concept of *vindicatio*, the ability to sue for ownership on the basis of rightful claims (*vindiciae*) to the property in question. Romans expanded the contexts in which the term was used so that *vindicatio/vindicare* "eventually assumed a general meaning ... of laying claim to, asserting one's right to."⁷⁶ Scipio exploits the concept to similar effect here. In instances where the rightful claims of the people are denied, they have no rights and there is no "property of the people." Because the respect for a degree of rights is a necessary condition for the existence of a *res publica*, the regime that would deprive its citizens of their rights can no longer claim to rule over a *res publica* at all.

The preceding argument has enabled Scipio to introduce the question of political legitimacy: what conditions must a government meet in order to possess the authority to rule?⁷⁷ Legitimacy presupposes the idea that there is a logical distinction between those who govern political society and those on whose behalf they govern.⁷⁸ In fact, this distinction has been present in Scipio's discussion since Book 1. Soon after introducing the idea of political society as a partnership or cooperative enterprise, Scipio had pointed out that "every *res publica*" or "property of the people" "must be managed by some deliberative element ... but that element must always be conducted according to that first cause which produced the city" (*Rep.* 1.41). The manager or managers of the republic may be one, few, or many. However, whoever manages the property of the people on behalf of the entire partnership or association must do so for the common advantage (*utilitatis communio*) and, especially, in such a way as recognizes that the *populus* maintains ownership over the republic. The governor or

⁷⁶ Berger (1991) 766. ⁷⁷ See Schofield (1995) esp. 65–6.

⁷⁸ Malcolm Schofield points out that the concept of legitimacy requires two prerequisites: "(1) popular sovereignty and (2) government as something not necessarily undertaken by the people themselves. Otherwise there is no body with rights relative to which the ruling power has to justify its legitimacy" (Schofield (1996) 833–4 n. 5).

governors, like a “manager (*tutor*) and caregiver (*procurator*) of the commonwealth” (*Rep.* 2.51), must respect the rights of the citizen-owners, the “free people,” who “entrusts itself (*se committat*)” to their care (*Rep.* 1.51). In making this argument, Scipio is extending the metaphor of the commonwealth as a partnership or cooperative enterprise. Just as, according to Roman law, a partner has the right to sue or take action (*agi potest*) if his rights are infringed by either another partner⁷⁹ or the manager (*tutor*)⁸⁰ of the partnership, so too in the case of political society. In such an instance, the people as rights-holders may undertake legal action (*agere*) to “recover its own property” (*rem suam recuperare*).⁸¹

The implications of Scipio’s preceding analysis are significant. Through the separation of the people as a body with rights from those who govern, he has created a zone of non-coincidence between rights fundamental to Romans as citizens and the incidental rights which a given regime may confer. The former class of rights provides the grounds for legitimate claims against the prevailing regime. Thus, in at least one crucial sense, Scipio’s account conceives of citizens’ rights as moderns typically do, as trumps or limitations on the actions of rulers.

Scipio has grounded the notion of citizens’ rights in the very idea of a *res publica*. However, this raises a further question: why should Scipio’s particular account of political society be privileged over other possible accounts? Is he able to provide a justification for appealing to the very Roman concept of a *res publica* in order to ground citizens’ rights? What is his warrant for doing so? The short answer is that history – and in particular the history of the Roman Republic – provides such a warrant.

In crafting Scipio’s discussion in *De republica*, Cicero was able creatively to deploy a number of Roman legal and political concepts to present a theoretical account of political society. However, at its most basic, this account develops a widely held intuition about a Roman’s identity as a *Roman* citizen, namely, that to

⁷⁹ See *Dig.* 17.2.45.

⁸⁰ See *Dig.* 17.2.46. For Cicero’s notion of government as something which the people entrusts to a guardian, see N. Wood (1988) 132–5 and Schofield (1995) 80–1. Both Wood and Schofield point out parallel passages in *De officiis*.

⁸¹ See *Cic. Rep.* 3.35 = 3.44–5, also discussed above.

be a Roman citizen – and in particular a citizen of the Roman Republic – is to exist in a free condition and consequently to enjoy a degree of liberties, privileges, powers, and rights.⁸² This identity is anchored in the Romans' historical consciousness. Consider for instance the beginning of Book 2 of Livy's *History of Rome*. As he concludes his account of the monarchy and transitions to the early Republic, Livy announces that "from this point I will be dealing with the deeds (*res gestas*) ... of a *free* Roman people."⁸³ As Livy presents the account, the history of how the Roman people came to enjoy a free status is in fact the history of how they also came to possess certain powers and rights. And so he begins his account by employing the same matrix of terms that Scipio used in *De republica*: "However, you should recognize that the very beginning of liberty (*libertatis*) came about at first because the consular power was made to last a year rather than because there was any lessening of kingly power (*ex regia potestate*). For the first consuls possessed (*tenuere*) all the rights (*iura*) and all the insignia [of kings]."⁸⁴ As Livy goes on to show, this initial situation would not last, as the people gradually received more powers, freedoms, and rights. The most important of these rights included *conubium*, the right to intermarry with patricians, and *provocatio*, the right to appeal sentences for capital offenses to the people.⁸⁵

Likewise, in the historical second book of Cicero's *Republic*, Scipio chronicles how the Romans moved from a condition in which they lacked liberty (*libertas*) under the mastery (*dominus*) of a king, even if they had "some rights" (*aliquod ... populi ius*; *Rep.* 2.43), to the Republic, where they existed in a fundamentally free condition (*Rep.* 2.56). Under the new regime the people, "having been set free from the kings, adopted for

⁸² This intuition about the relationship between Roman citizenship and freedom is apparent in the Roman law of persons where there is a basic division of subjects into "those who are *sui iuris* and those who are *alieni iuris*." To lack liberty is to be "in the power of another" (*in aliena potestate*) whereas to be free is to be under one's own power (*sui iuris*; *Dig.* 1.6.*titulus* and 1.6.1). See also Brunt (1988) Ch. 6 and Skinner (1998) 40–1. Brunt (1988) 296 concludes that the "political freedom of the individual citizen can indeed be equated with his citizenship" (emphasis in the original).

⁸³ Livy 2.1.1. I have italicized "free" to reflect the fact that *liberi* is in an emphatic position.

⁸⁴ Livy 2.1.7–8. ⁸⁵ For references, see note 30.

themselves rather more rights" (*Rep.* 2.57).⁸⁶ For Scipio, as for Livy, chief among the rights that the people enjoyed was *provocatio*. By 449 BC, he points out, citizens held this right against all magistrates, and by 300 BC specific penalties were devised for magistrates who violated this right (*Rep.* 2.54). Significantly, Scipio had prefaced this discussion by pointing out that the historical development of the Roman Republic was to serve as a model (*exemplum*) for his treatment concerning the best condition of a state (*de optimo civitatis statu*; *Rep.* 1.70). History supports theoretical analysis.

The accounts of Cicero and Livy present a historical perspective from which to assess the status of Roman citizens. From this perspective to be a Roman citizen, and in particular a citizen of the Roman Republic, entails that one be free, a status which consists of the exercise of fundamental powers and rights. These rights are fundamental to, and bound up with, the identity of a Roman. They are thus not dependent upon the decrees of the prevailing regime and, as Scipio argues in the *Republic*, provide a perspective from which to assess a given regime's authority to rule. Scipio's definition of a *res publica* provides Cicero with an attractive and formal way to articulate a conception of citizens' rights derived from the logical conception of citizenship in a *res publica*, itself anchored in a historical perspective.⁸⁷

This appeal to a historical perspective according to which Romans assumed rights as *Roman* citizens has a counterpart in early modern political thought, where in the sixteenth and seventeenth centuries theorists employed historical scholarship to recover a sense of citizens' rights.⁸⁸ This historical perspective allowed one to speak of the rights and liberties of an Englishman, Frenchman, or Dutchman. The result is a third option for the grounding of rights in addition to nature and conferment by

⁸⁶ *ut plusculum sibi iuris populus ascisceret liberatus a regibus.*

⁸⁷ Hence, it is overly simplistic to hold forth nature and positive law as the only possible grounding for citizens' rights. The same point also holds for liberty. We should not juxtapose natural liberty and liberty according to positive law as if they represent the only options available to Roman thinkers, as Brunt (1988) appears to do at one point in his magisterial survey of the Romans' conception of liberty (287).

⁸⁸ See e.g., Hugo Grotius, *Liber De antiquitate Reipublicae Batavicae* (first published in 1610).

governing authorities. As in Scipio's account, history provides a "critical perspective" on current regimes.⁸⁹

Rights, justice, and the common good

It should now be clear that Scipio's definition and analysis of *res publica* is consistent with the intellectual self-portrait he presented at the outset of the dialogue: Roman political practice has been the predominant shaping force. Scipio has consistently construed the basic components of his definition – *res*, *ius*, *societas* – in terms of their technical meanings in Roman law. Thus, the common practice of searching for Greek equivalents for the individual terms in Scipio's account is a relatively fruitless endeavor. Even if it is possible to find Greek terms that serve as adequate equivalents of the Roman terms,⁹⁰ it is unnecessary to postulate Greek sources when Roman concepts possess sufficient explanatory power, especially when Scipio has alerted his listeners that he is addressing them as "a member of the toga-wearing party" and as one "not preferring Greek ideas to our own" (*Rep.* 1.36).

More could be said about how the foundational concepts of Scipio's discussion, couched in legal terminology, differ from possible Greek equivalents. However, the question of the provenance of individual concepts must not distract us from the more interesting matter of where Scipio's account of political society stands in relation to other important accounts. What exactly has Cicero achieved? The most influential accounts of political society have long been those of Aristotle and Locke. They will serve as points of comparison.

First consider Aristotle. Political society for Aristotle, as we have already noted, aims at the "political good," that is, "justice" and "the common advantage."⁹¹ As Constant and many others since have pointed out, most accounts that so prioritize the common

⁸⁹ See Brett (2003) 110.

⁹⁰ For example, one might use τὸ δίκαιον to translate *ius* and κοινωνία for *societas*. *Res publica* presents a trickier case, and, as Schofield (1995) 66–9 argues, it is likely that no Greek word adequately covers the same semantic range.

⁹¹ Arist. *Pol.* 3.12.1282b17–18.

good leave little room for concern with rights.⁹² And in fact, most historians of political thought maintain that it is misleading and anachronistic to impute the concept of rights to Aristotle. It would seem, then, that the mere presence of rights in Scipio's account of political society would differentiate it from Aristotle's. Still, the distinctions between the two accounts can and should be drawn more carefully. Perhaps ironically, it is the work of a scholar who reads Aristotle as a rights theorist that best facilitates this endeavor.

Fred Miller has argued at length that Aristotle's discussion of justice can be construed in terms of individual rights.⁹³ Indeed, Miller has identified a variety of putative locutions for rights, which he suggests correspond to the four categories of rights according to the widely followed analysis of W. N. Hohfeld.⁹⁴ Of special importance for Miller's analysis are claim-rights, that is, rights construed as legitimate claims. He contends that Aristotle employs τὸ δίκαιον to indicate a right in precisely this sense.⁹⁵

One of the key passages for Miller's argument is *Politics* 3.12.1282b18–30, which he translates as follows:

Everyone believes that justice (*to dikaion*) is a kind of equality, and up to a certain point they agree with the philosophical discussions containing determinations about ethics. For they say that justice is a certain thing and it is for certain persons, and it must be equal for equal persons. But we ought not to overlook what sort of persons have equality or inequality. This is puzzling and involves political philosophy. For perhaps someone would say that the offices ought to be distributed unequally according to prominence in any good characteristic, although [or even if] in any remaining respects they do not differ at all but happen to be similar, because those who differ have a different just-claim right (*to dikaion*) and merit-based claim (*to kat' axian*). But if this is true, those who are prominent in virtue of complexion, size, or any other good will have an excess possession (*pleonexia*) of political rights (*tôn politikôn dikaiôn*).⁹⁶

This passage suggests that there are several differences between Aristotle's use of τὸ δίκαιον and Scipio's employment of *ius* in their respective accounts. First, Scipio's account refined the conception of *ius* in play not only by utilizing the matrix of *ius*, *potestas*, and

⁹² Constant, *Political Writings*, 312. ⁹³ See Miller (1995).

⁹⁴ Miller (1995) 93–111. ⁹⁵ Miller (1995) 97–101.

⁹⁶ Miller (1995) 100.

libertas familiar from Roman legal and political thought, but also by indicating possession with a verb of holding and the possessive adjective. As a result, one cannot help but translate *ius* as “a right” or “rights”: “If indeed the people holds on to (*teneant*) its own rights (*ius suum*) ...” (*Rep.* 1.48). In the case of Aristotle, however, there is nothing in the text to signify why one should translate τὸ δίκαιον as “justice” the first two times it occurs but on the third occasion render it in the special and more narrow sense of “just-claim right.” It is certainly possible to translate this third instance of τὸ δίκαιον as “a right,” and Miller cites several translators who do so, but it is equally possible to render the term “justice,” as Carnes Lord does in his translation. Moreover, instead of “an excess possession of political rights,” Lord translates πλεονεξία τις τῶν πολιτικῶν δικαίων as “some aggrandizement in [claims to] political justice.”⁹⁷ The point is not to commend Lord’s translation, but simply to point out that when the particular context does not in any way restrict the meaning of τὸ δίκαιον to indicate that it is being employed in a special sense as “a right,” the far more common meaning of the word, “justice,” is always a possibility. In contrast, Scipio has carefully signified that he is employing *ius* as a right and so has excluded such common meanings as “justice” and “law.”

Next, notice that in Miller’s translation Aristotle glosses a “just-claim right” as a “merit-based claim.” One’s “rights” are a function of one’s merit. And, as Aristotle points out, different parties suggest different characteristics on the basis of which to determine merit. Thus, on Aristotle’s account different theories of distributive justice will generate different political rights for different people. In an oligarchic regime, which determines merit according to wealth, the wealthy will have more political rights. And similarly in an aristocratic regime, which determines merit according to virtue, the virtuous will receive more political rights.⁹⁸

This observation helps to uncover three further differences with respect to the way “rights” function in Aristotle’s and Scipio’s respective theories of political society. First, while in Aristotle’s theory “rights” are to be determined strictly according to desert

⁹⁷ Lord (1984) 104. ⁹⁸ See Miller (1995) 124–5.

or merit, on the modern conception rights are often unrelated to desert, worth, merit, or fit.⁹⁹ If I have the right to a certain coat, it need not be because the coat fits me especially well; it could also be because I own the coat.¹⁰⁰ Likewise, Scipio's arguments in *De republica* do not make rights a function of merit. In making a democratic case for equal rights under law for citizens in a given *res publica* at *Rep.* 1.48–9, Scipio explicitly eschews considerations of desert, worth, merit, and fit. And in his Book 3 discussion, which develops the central insights from his earlier argument, Scipio argues that the people have legitimate claims against governing authorities because the very concept of the *res publica* requires that they “own” it. He does not in this part of the discussion suggest that these rights attach to the people as a function of their merit.

The observation that rights for Scipio are not a function of merit, as they are for Aristotle, leads to the second difference between the two accounts. Since rights on Scipio's account are no longer strictly rendered according to merit, they can enter into the calculation of how to distribute goods according to justice at a different point. Whereas for Aristotle “rights” are the product or result of distributive justice, for Scipio and the moderns rights are factors that one must take into account as one performs the calculations. They are trumps or limitations on how the goods may be distributed. Once again, consider the example of coats. Distributive justice requires that the rulers distribute a collection of coats according to fit. However, the fact that some individuals own some of these coats (and thus have rights to use them) limits the way in which the ruler can legitimately distribute them. Similarly, on Scipio's account the fact that the people is a body with certain rights limits the way in which regimes can rule.

This leads to the final, and most important, difference. Aristotle's account lacks the zone of non-coincidence necessary for the concept of citizens' rights that was central to Scipio's account. For Aristotle, rights are the products of calculations of merit undertaken

⁹⁹ See Schofield (1996) 853.

¹⁰⁰ I adapt this example from Strauss (1965) 147. See also Zuckert (1989) 82. Aristotle himself uses the example of flutes (*Politics* 3.12).

according to the principles adopted by a particular regime. Thus, each regime will confer a different set of political rights. There is no conception of the citizens as a body of rights-holders possessing rights that have not been conferred by the ruling regime and that place limitations on how the regime may rule.

Of course, according to Aristotle, one can adjudge a regime more or less just insofar as it has allocated offices and honors according to justice. But the introduction of citizens as a prior body of rights-holders leads to quite different considerations. These are in part brought out by Alan Ryan, who nicely contrasts the motivation for the ordering of political society of such right-order theorists as Plato and Aristotle with that of a modern thinker such as Locke.

Neither Plato nor Aristotle held that justice was a matter of individual rights. Plato's confiding power to the Guardians and Auxiliaries, and his insistence on an aristocratic form of government may seem to imply that only philosophers are *entitled* to rule, or have a *right* to govern. But this is not the argument. The setting is that of building a state on rational principles; the standpoint is not that of individuals claiming rights, but that of a builder placing human material in its proper place in the fabric. States need good rulers, and that is what the Guardians are. Aristotle's discussion of a state that achieves freedom and justice in a stable setting does not treat this as a question of rights – unlike Locke's treatment of the same question. Locke's state is the result of a contract between the holders of prior rights; Aristotle's allocates authority to classes and individuals according to a rational and morally acceptable scheme – according to justice – but not to protect or recognize individual rights.¹⁰¹

Insofar as it posits that citizens are possessors of non-conferred rights, that is, rights that are prior to particular regimes, Scipio's account of political society is closer to Locke's than either Aristotle's or Plato's.

However, despite this similarity, it would be very misleading to designate Scipio's account "Lockean." For Locke, as Ryan indicates, political society is the product of a contract between individual holders of prior rights. And for Locke, as for other contract theorists, political society is an instrumental good,¹⁰² which

¹⁰¹ Ryan (1993) 3.

¹⁰² Although Locke begins his account of the formation of political society in his *Second Treatise* by stating that God put man "under strong Obligations of Necessity, Convenience, and Inclination to drive him into *Society*" (§77; emphasis in the original), he goes on to argue that individuals form civil society as a means of preserving their property (§123–4).

sometimes curtails man's natural desires and frustrates some of his natural aims. Men are willing to sacrifice some of their natural freedoms, powers, and rights to achieve the mutual preservation of their lives, liberties, and property.¹⁰³ Ancient contract theorists similarly held political society to be instrumental and to frustrate natural desires;¹⁰⁴ in fact, Cicero places one such account in the mouth of Philus in the third book of *De republica*.

Scipio's original definition, which holds that political society is an assembly "associated with one another by an agreement (*consensu*) about *ius*," has suggested to some commentators that his account of political society is similarly contractarian.¹⁰⁵ But on Scipio's account political society is not a purely instrumental good. The "first cause" of uniting is not "weakness," as in Locke and Hobbes, but "some natural association of men, as it were." The human race is so constituted that even provided the abundance of other goods men will still desire this good (*Rep.* 1.39).¹⁰⁶ He makes a similar point at *Rep.* 4.1 = 4.3, where he suggests that "the first cause of the creation of society" is to promote "that partnership (*societas*) of citizens living happily and honorably." For Scipio political society is a good in itself.¹⁰⁷ Similarly, political society with its laws and institutions does not frustrate or curtail man's natural desires rightly understood. Indeed, just the opposite: political society further develops and nourishes that which is natural. As Cicero, speaking in his own voice, states in the proem to *Rep.* 3: "The former [*sc.* the philosophers] nourished the principles of nature with words and theories, but the latter [*sc.* the statesmen] *nourished* these natural principles with institutions and laws" (*Rep.* 3.4 = 3.7; emphasis added).

¹⁰³ See Locke, *Second Treatise*, §123–31.

¹⁰⁴ See the arguments of Glaucon in Plato's *Republic* (2.358d–362c) and Callicles in Plato's *Gorgias* (483a–484c).

¹⁰⁵ See Villey (1971) 278, 285. James Zetzel similarly comments at Zetzel (1995) 129: "What is offered here is a contractual theory of the state."

¹⁰⁶ Scipio's statement at Cic. *Rep.* 1.39 seems to follow Aristotle, *Politics* 3.6.1278b16–30. The Stoics also held that men possessed a natural inclination to society (Cic. *Off.* 1.12).

¹⁰⁷ Cicero also adopts this view in his later *De officiis*, as E. M. Atkins (1990) 269–72 argues.

What is more, Scipio's account does not posit the existence of rights-holding individuals in a condition prior to political society, as does Locke. Rather, as we have seen, on Scipio's account Romans always possessed their rights within the context of political society. Citizens grounded their claims against current regimes in a historically Roman and republican conception of the city. These claims did not depend on the concept of natural rights, itself anchored in a conception of paradigmatically free pre-civil individuals. Rather, they originated from within the context of political society itself. This is an important point, for one of the reasons that rights talk has come under heavy criticism in recent years is the perception that the language of rights is inextricably bound with individualistic accounts of society. The presence of the concept of rights signals the absence of the notion of the common good. As Stanley Hauerwas argues:

I suggest the language of rights tends toward individualistic accounts of society and underwrites a view of human relations as exchanges rather than cooperative endeavors. Contemporary political theory has tended to concentrate on the language of rights, not because we have a vision of the good community, but because we do not. As a result, we have tried to underwrite the view that a good society is one where everyone is to be left alone rather than one that tries to secure the kind of cooperation that gives one a sense of contributing to a worthy human enterprise.¹⁰⁸

Though the concept of citizens' rights is central to his conception of political society, Scipio's account of society is not individualistic. In fact, the argument at *Rep.* 1.49 maintains that a necessary condition for *societas* is a bond (*vinculum*), some component of civil society (*civilis societas*) that all members can share in equally. The answer given is equal rights (*ius aequale, iura paria*) by which citizens who share the same condition (*condicio*) under law engage one another. Rights are civic bonds. On Scipio's account, if political society is a natural good, then rights are an essential component of this good. The possession of rights unites rather than divides citizens.

In fact, Hauerwas' language of "cooperation" and "human enterprise" is evocative of Scipio's own terminology, for on the

¹⁰⁸ Hauerwas (1987): 238–9. For a similar sentiment, see also Mary Ann Glendon's chapter with the telling title "The missing dimension of sociality" in Glendon (1991) 109–44.

latter's account political society is conceived as a cooperative enterprise undertaken by the people. The presence of *consensus* ("agreement") in the original definition might suggest to some that the individualism of later contract theorists has also found its way into Scipio's account of political society. The word is sometimes translated "consent," which has a Lockean ring and is perhaps the main reason why some would place Cicero within the contractarian tradition. However, as Elizabeth Asmis notes, such a rendering is misleading, for "what is required is not simply assent, but a shared position."¹⁰⁹ In context the term has in view not bare assent to an exchange, but common agreement in a shared endeavor. Scipio draws this aspect of the term out even further at the end of the second book in the passage where he speaks of the city in terms of a music metaphor, which we first encountered in [Chapter 2](#). Common agreement does not merely bring one into a legal relationship with one's fellow citizens; rather, it brings one into a shared undertaking with common benefits and goals. Scipio likens the result of the common efforts of citizens to harmony in music: "the city sings harmoniously with the agreement (*consensu*) of very different groups" (*Rep.* 2.69). This second important occurrence of *consensus* is found at the end of a passage that describes the ideal regime under the direction and guidance of the ideal statesman. As we noted in [Chapter 2](#), the musical imagery employed in this passage is adapted from Book 4 of Plato's *Republic*, where Socrates locates justice in the ideal city in psychic and political harmony.

This allusion to Plato serves as a timely reminder that to appreciate fully Cicero's position, Scipio's definition and analysis of *res publica* should be placed in the wider context of the political philosophy of *De republica*. Scipio agrees with Plato and Aristotle that the guiding question for political theory is the nature of the best regime. And like Plato and Aristotle, Scipio holds that the best regime promotes a just distribution of goods and honors and is characterized by agreement about the common good. Unlike modern liberalism with its priority of right over the

¹⁰⁹ Asmis (2004) 578.

good,¹¹⁰ the search for a substantive and comprehensive notion of the political good continues to receive priority. Yet, quite consonant with his stress on the limits of reason and rational rule, Scipio endeavors to spell out the limits of what those who govern may legitimately do in pursuit of what they take to be the good. Thus, through Scipio's analysis of *res publica*, Cicero raises a second question: what conditions must those who govern fulfill in order to count as rulers over anything worthy of the designation "political society"? The answer, of course, is that they must acknowledge the rights of the ruled. If the question of the best regime was the leading question of Plato and Aristotle, this second question – the question of legitimacy – took center stage in the political philosophy of Locke and his followers. Thus, we find that Cicero did more than transplant Greek political philosophy to Rome. Drawing on Roman political and legal resources, he was able to incorporate a conception of rights into his theory of political society. In the process, he moved beyond the analyses of his Greek models to ask and answer his own question.

Nature's conspicuous absence

I have argued that the originality and power of Scipio's discussion of political society derived chiefly from his deployment of certain *Roman* political and legal concepts. Of the absent *Greek* concepts perhaps the most conspicuous is nature. After all, the Book 3 debate between Philus and Laelius on natural law separated Scipio's discussion of political legitimacy later in that book from his original definition of *res publica* and his historical account of Roman citizens' rights in Books 1 and 2. In [Chapter 1](#) we saw that Laelius' arguments for the naturalness and rationality of Roman rule were problematic and observed that Scipio's reticence to endorse these arguments encourages the reader to reflect further on their validity. It is now possible to conjecture

¹¹⁰ This slogan is particularly associated with the philosophy of John Rawls. The difference between his position and Cicero's is most evident when he tries to relate his notion of justice to that of the good political society. See especially Rawls (1988).

what might have been Scipio's motive for wishing to exclude the concept of nature from his account of political society. Locating citizens' rights in civic history rather than in nature enabled him to search for a critical perspective on current regimes from *within the city itself*; he thus avoided the tendency of nature to threaten the legitimacy of political rule – not just tyrannies, but any regime that transgresses natural law or right reason in any way whatsoever. In doing so, Scipio sidesteps the very problem that shipwrecked Laelius' efforts to utilize nature to legitimize Roman rule: how does one use nature and reason as a standard for regimes while still maintaining the legitimacy of regimes that do not completely meet this standard? This is no small problem. Indeed, contemporary philosophers who adopt the *modern* concept of natural rights still struggle with the modern analogue of this problem: is a state that violates some rights while securing others legitimate?¹¹¹

But Scipio's response is not completely satisfactory. In fact, it is susceptible to an argument derived from evidence that Philus (speaking as the skeptic Carneades) adduces against natural justice. Civic history is the history of a city's customs, institutions, laws, and behaviors – what we may call tradition. Yet these traditions widely vary from city to city and, as Philus points out, have even constantly changed and conflicted throughout the history of Rome (*Rep.* 3.10 = 3.17). How, therefore, may tradition serve as a standard?

One possibility would be to argue, as Michael Oakeshott later does, that the temporality and variability within civic history nevertheless exists *within* a larger definable civic tradition, which is not arbitrary and needs no grounding in reason or nature.¹¹² Of course, such an argument still does not address the potential conflict *between* civic traditions. Roman rulers are constrained by the people's rights when they deal with *Roman* citizens, but what about non-Roman citizens, such as the allies mentioned in the debate between Philus and Laelius? Moreover, how do history and tradition relate to the particular science of politics based

¹¹¹ See e.g., Morris (2005). As Morris notes, Robert Nozick's 1974 book *Anarchy, State, and Utopia* raises this question in a particularly trenchant manner.

¹¹² See Oakeshott (1962) 128–9.

on Platonic rationalism that we have been exploring in previous chapters? A position that both upholds the rational and ideally best as normative *and* seeks to accommodate the contingent and historical – as Scipio's does – risks losing a philosophical grasp on the former – as Laelius did – or devaluing the latter. How should one negotiate such a perilous position? What happens when nature is brought to bear directly on the city, and not deflected, as Scipio craftily does in Book 3? For the answer to these questions, we must turn to Cicero's *Laws*.

CHAPTER 5

NATURAL LAW

Approaching the *Laws*

Darkness was descending upon Scipio's estate and the first day of conversation was drawing to a close. Scipio was putting the finishing touches to his account of the best regime when he was interrupted by Tubero. Scipio's scientifically minded nephew had passed the time in silence while his uncle addressed the concerns of the much older and more politically experienced Laelius. But although he was not speaking, Tubero was listening intently and, when his elders grew silent, the young man eagerly seized the opportunity to express his dissatisfaction with his uncle's account. The discussion to this point had focused too narrowly on Rome and consequently was not applicable to other states. Moreover, "I have not yet learned from your speech by what training, customs, or laws (*legibus*) we could set up or preserve that very *res publica* which you are praising" (*Rep.* 2.64).

Scipio disagrees with the suggestion that his methodology was too restrictive and goes on to explain how his speech did in fact meet Laelius' initial request to provide an account of the best regime. As to Tubero's second point, Scipio chooses to defer discussion for a later occasion: "I think that very soon you will have a more appropriate place for discussing the foundation and preservation of states, Tubero" (*Rep.* 2.65).

Scipio's promise is partly fulfilled during the next day's conversation. He himself sets the agenda by pointing out that "the association of citizens living happily and honorably" is to be secured "in part by institutions and in part by *laws*" (*Rep.* 4.1 = 4.3; emphasis added). The mutilated state of *De republica* 4 makes it impossible to follow the argument, but the book's fragments suggest that the discussion concentrated on institutions – customary standards of social behavior – and education rather than on

legislation.¹ The men discuss the role of poetry, the theater, and gymnastics in education, but presumably do not attempt to fashion a code for the city. Their exercise is closer to Books 2, 3, and 5 of Plato's *Republic*, which seem to have been a point of comparison (*Rep.* 4.18–19 = 4.5),² and the first three books of Plato's *Laws* than to the detailed law code found in Books 5–12 of the latter work. Cicero's *Republic* does not completely address all of the methods by which political society achieves that for sake of which it was initially formed: the happy and honorable lives of its citizens.³ Tubero's question is never fully answered. What is required is a detailed treatment of the sort of legislation that will promote the happy and honorable lives of citizens. This project is undertaken in Cicero's *Laws*.⁴

As I briefly pointed out in [Chapter 1](#), the dramatic date of *De legibus* is sometime in the late 50s BC and the cast of characters includes Cicero himself, his friend Atticus, and his brother Quintus. The three meet in the summer on Cicero's family estate in Arpinum. After Cicero's absence from the conversational portions of *De republica*, his presence as the leading character in *De legibus* is somewhat striking. Unlike in the case of its companion piece, here there seems to be little authorial detachment. In fact, in his commentary on the dialogue, Andrew Dyck rates the *Laws* "as the most introspective work he [Cicero] intended for the public and as his finest achievement in self-presentation."⁵

There are at least two likely reasons for Cicero to have written himself into *De legibus*. The first of these I have already suggested in [Chapter 1](#). Just as the foremost literary model for *De republica* was Plato's *Republic*, so the primary literary model for *De legibus* is Plato's *Laws*. And because Cicero believed that the Athenian Stranger represented Plato himself, he found in the *Laws* a precedent for writing himself into his own dialogue. Second, it is possible that Cicero finally was persuaded by his friend Sallustius'

¹ See Zetzel (2001) 93–4, esp. 93 n. 29.

² See also Nonius fragment 308.38, which refers to the exile of Homer from Plato's *Republic*.

³ Cic. *Rep.* 4.1 = 4.3.

⁴ At Cic. *Leg.* 2.11 Cicero's character affirms Scipio's assessment that the goal of legislation is to promote the happy and honorable lives of citizens.

⁵ Dyck (2004) 26.

criticisms that his discussions of political affairs would be much more effective if presented in his own authoritative voice.⁶ Cicero may very well have found the expression of his authority more appropriate to his task in *De legibus* where, like the Stranger in Plato's *Laws*, he plays the role of a lawgiver (*Leg.* 2.14, 24): the act of legislating requires the exercise of authority in a way that a philosophical enquiry does not and – from Cicero's point of view – should not. And it is this very public act of legislating that is enacted in the *De legibus*. The dialogue is, as Catherine Steel observes, “in some sense the performance of the public figure.”⁷

Even though Cicero's character may be taken to represent the author's own views, we must remember that the Cicero of the dialogue is taking part in a fictitious conversation modeled on a Platonic dialogue. Cicero the author may communicate to the reader in other ways than by the explicit statements of the character Cicero. As in *De republica*, the reader should pay attention to the way in which the dialogue represents the characters. In particular, we shall see how the politically minded Quintus' failure to grasp Cicero's arguments at a couple of points draws attention to bits of information crucial for interpreting the dialogue.⁸ We will also see that actions that Quintus and Atticus perform (or fail to perform) in the context of their role as a popular assembly responsible for ratifying the enactments of Cicero the lawgiver have important implications for communicating the philosophy of the dialogue.⁹ Because the message of Cicero the author is not in every instance completely reducible to the utterances of Cicero the character, I shall refer to the latter as “Marcus,” reserving the designation “Cicero” for the former.

The conversation of *De legibus* begins with the discussion not of legislation but of whether an old oak tree on the estate is the same one referred to in Cicero's *Marius*, a poem dealing with the life of Arpinum's most famous resident prior to Cicero. When

⁶ Cic. *Q. Fr.* 3.5.1. Malcolm Schofield makes this suggestion at Schofield (2008) 76.

⁷ Steel (2005) 79.

⁸ See Cic. *Leg.* 2.13–14, 15–17; 3.26. See discussion at pp. 162–4, 206–7, 210–12.

⁹ For the dialogue's presentation of Cicero as lawgiver and Atticus and Quintus as popular assembly, see Cic. *Leg.* 2.14, 24, also cited above. For the implications of their refusal to approve of Cicero's laws at *Leg.* 3.19–26 and 3.33–9, see discussion in Chapter 6.

Atticus asks Marcus to comment on the historicity of his poem, his friend replies by asking whether the North Wind, Boreas, actually abducted Orithyia from the Ilissus (*Leg.* 1.3). Phaedrus had asked Socrates about the veracity of this story in the *Phaedrus*, and Marcus uses it to make a similar point to the one made by Socrates: one should not spend too much time investigating the truth of such stories.¹⁰ Socrates goes on to say that one should rather spend one's time obeying the Delphic oracle's command to achieve self-knowledge.¹¹ *De legibus* 1 concludes with Marcus praising philosophy's greatest gift – the teaching that one should strive to know oneself in obedience to the Delphic oracle. The first book of *De legibus*, then, begins and ends with references to the *Phaedrus*. The significance of this will become clear shortly.

The conversation moves from poetry to history. When it reaches the topic of law, Atticus presents Marcus with the following assignment: "Because you have written about the best form of the commonwealth, it seems to follow that you should also write about the laws. For that Plato of yours has done likewise, a man whom you admire, whom you place before all others, whom you cherish most of all" (*Leg.* 1.15). Marcus responds by comparing their present task to that of "Plato," Clinias, and Megillus in Plato's *Laws*: he and his interlocutors will spend the day discussing "the best laws" (*de optimis legibus*). A little while later Marcus refines their task:

Therefore since it is our task to preserve and protect that form of constitution which Scipio taught was the best in those six books, and since all the laws must be adapted to that kind of state, and also since moral habits must be cultivated and not everything is to be established by written laws, I will seek the root of justice from nature. Our entire discussion must unfold with nature as our leader. (*Leg.* 1.20)

The preceding passages are vital for understanding the agenda of *De legibus*. First, Quintus and Atticus seem to be familiar with *De republica*. In fact, they appear to have read the work. At one point in Book 2, Atticus agrees with Marcus that they should fit laws to the best regime because he found persuasive Scipio's argument that the ancient Roman Republic was the best of all *res*

¹⁰ Cic. *Leg.* 1.4 and Pl. *Phdr.* 229b–d. ¹¹ Pl. *Phdr.* 229e–230a.

publicae (*Leg.* 2.23). Marcus will refer to Cicero's *Republic* intermittently throughout the dialogue (*Leg.* 2.23; 3.4, 13, 38). Indeed, the teachings regarding the best regime of *De republica* will guide the legislation of *De legibus*. Marcus agrees with Aristotle: "Laws should be enacted – and all are in fact enacted – with a view to the regimes, and not regimes with a view to the laws."¹²

If the characters in *De legibus* are familiar with Scipio's argument in *De republica*, then they too should recognize what we have come to learn: the Roman constitution is not the best regime absolutely, but the best practicable regime. More precisely, the Roman constitution is the best exemplification of the best practicable regime, the mixed constitution (*Rep.* 2.42, 66). The distinction is a fine one, and in fact, when referring to the regime of *De republica*, Marcus will sometimes speak as though he has in mind the best practicable regime, the mixed constitution, and sometimes its best exemplification, the constitution of ancestral Rome (*Leg.* 2.23). In any event, Scipio had taught that the mixed constitution was practicable because it accommodated human nature and conformed with the teaching that political affairs do not yield completely to reason. Scipio had learned these teachings from Plato and was indebted to Plato's *Laws* for his conception of the mixed constitution. It is not surprising, then, that *De legibus* (3.33–9), no less than *De republica* (2.52) and Plato's *Laws* (742e), emphasizes the consideration of what is possible in addition to what is best absolutely.

Given the preceding observations, one may assume that when Marcus says that his goal in *De legibus* is "to preserve and protect" the best form of commonwealth, he will in fact be defending the best practicable regime, that is, a regime that deviates from the strict dictates of reason and nature to embrace an element of irrationality and conventionality. He will attempt to complete this task, not by using the authority of written laws, but by utilizing the authority of nature and her law, "the highest," "perfect," or "right" reason (*Leg.* 1.18; cf. *Leg.* 1.33 and *Rep.* 3.27 = 3.33). This is the proper standard for justice and injustice (*Leg.* 1.19). The problem confronting Marcus in *De legibus* is how to use reason to

¹² Arist. *Pol.* 4.1.1289a13–15 (trans. Lord).

defend a city that does not strictly meet reason's requirements and how to use nature to support written legislation that deviates from nature's norms. This, of course, is similar to the challenge that had tripped up Laelius in the third book of *De republica*. Cicero himself has replaced Laelius as the defender of the city.

Unlike Laelius, Cicero is fully aware of the difficulty of his task, even if Quintus and Atticus say nothing at this point about potential problems with Marcus' undertaking. He has already demonstrated in *De republica* the tension between philosophy and politics, nature and the city, perfect rationality and human nature. Now Cicero, like Plato, will attempt to codify in written legislation nature's decrees enjoining citizens to live virtuously.¹³ Such an undertaking poses philosophical difficulties, and in fact, writing has an uncertain status in the first book of *De legibus*. Throughout the early parts of the conversation, Marcus and Atticus continually confuse writing and speaking (*Leg.* 1.5–7, 8–9, 13, 14, 15, 16), and the series of exchanges culminates in Marcus' statement that their subsequent conversation will be infected by the ambiguity between the use of the word "law" in its philosophical sense to designate the reason of the sage and in its popular sense to indicate written legislation (*Leg.* 1.19).¹⁴ Perhaps, then, it is no accident that references to Plato's *Phaedrus* bookend the discussion of the first book, whose theme is said to have been inspired by Plato's *Laws*. Cicero draws our attention to the problematic nature of producing such written legislation by crossing the Platonic dialogue that offers legislation to be codified in writing with the Platonic dialogue that criticizes writing.¹⁵

Given the difficult nature of his task, how will Marcus use nature and reason to underwrite legislation designed to defend and preserve the city? It is the purpose of the remainder of this chapter and the one that follows to answer this question. In general, I find the dialogue's treatment of this issue to be managed far more adroitly than do most other commentators. As we will see in [Chapter 6](#), Marcus is largely successful in using nature to support

¹³ See Cic. *Leg.* 1.58 and Pl. *Leg.* 1.629a–630d, 1.631a–632d, 3.687c–688c, 12.963a.

¹⁴ See also Benardete (1987) 301.

¹⁵ For Socrates' critique of legislators, see especially Pl. *Phdr.* 278c.

the legislation that he proposes in Books 2 and 3. But before we can understand how he accomplishes this, we first must come to grips with Cicero's rather complex treatment of the subject of natural law advanced in the dialogue's first book.

Sources and the interpretation of *Laws* I

The portion of *De legibus* that draws our attention to the challenge that Cicero has set for himself also initiates a discussion of natural law. Marcus' lengthy exposition of the topic occupies the remainder of the first book. His argument, like Laelius' in *De republica*, has clear affinities with the Stoic theory of natural law. And if in fact Marcus is reproducing Stoic doctrine, his exposition would represent the lengthiest extant treatment of the theory for which the Stoics are deservedly famous and the only one in which there exists a full sequence of arguments for the concept of natural law. It is then perhaps not surprising that research on the first book of *De legibus* has mainly focused on a search for the sources of Marcus' argument.

The practice of hunting for the Greek sources behind Latin texts has increasingly fallen out of favor. And perhaps the enterprise has always occupied a somewhat questionable status in Anglo-American scholarship; for English-speakers, it is the technique that has never been deemed worthy of an English name, but rather is only to be referred to by a German word: *Quellenforschung*. Current suspicion of source criticism is not entirely without merit and its application to the first book of *De legibus* is a good example of why this is the case. All too often such research has produced little of value for understanding either Marcus' argument or its putative sources. Given the relative barrenness of *Quellenforschung* as traditionally applied to *Laws* I, it is tempting to ignore all questions of sources and get on with the business of interpreting the dialogue.

Yet we find that the dialogue continually pushes and prods us to consider Marcus' use of sources. Though he utilizes apparently Stoic ideas at several points, Marcus coyly attributes his argument to "very learned men" (*doctissimi viri*; *Leg.* I.18). Later Atticus

playfully accuses his friend of surrendering the liberty to use his own judgment – which as an Academic skeptic he values so greatly – for the reliance on the authority of others, a charge that Marcus disagrees with only in part (*Leg.* 1.36–7). And towards the end of the first book Atticus and Marcus resume their banter about sources: this time the discussion concerns the extent of their agreement with Antiochus of Ascalon, the Stoicizing Platonist who was also one of Cicero’s teachers (*Leg.* 1.54). However, it is not until early in the second book that the dialogue most forcefully draws our attention to the question of sources.

Marcus has just finished reciting a prelude to the forthcoming religious laws in apparent imitation of Plato when his brother Quintus enthusiastically gives his approval: “I am entirely pleased that you and he are concerned with different subjects and opinions. For nothing is so unlike Plato as what you said earlier or this prelude about the gods. You seem to me to imitate a single thing: his style” (*Leg.* 2.17). Though commentators have far too often taken Quintus’ remark at face value as evidence against the Platonic or Academic inspiration of *De legibus*,¹⁶ Quintus is simply mistaken about the source of Marcus’ prelude to the religious law code. The prelude in fact provides an impressively succinct summary of the Athenian Stranger’s own prelude to the religious laws in Book 10 of Plato’s *Laws*. There the Athenian Stranger sets out to persuade (πείθειν) the people that the gods (a) exist, (b) manage human affairs, and (c) refuse to condone wicked actions if bribed.¹⁷ Marcus’ first sentence of his own prelude reflects this same basic goal:

Therefore let the citizens first be *persuaded* of this (*sit igitur hoc ... persuasum civibus*), that the gods are the masters (*dominos*) and governors (*moderatores*) of all things, and everything that takes place occurs by their judgment and will; that they behave extremely well towards the human race and they observe what kind of person each individual is – what he does, what crimes he commits, with what disposition and with what piety he observes his duties to the gods; and that they take account of both the pious and impious. (*Leg.* 2.15; emphasis added)

¹⁶ See e.g., Pohlenz (1970–2) 2 :126 and Glucker (1988) 61.

¹⁷ Pl. *Leg.* 10.885d.

As in Plato's *Laws*, Marcus' prelude is designed *to persuade* the citizens that the gods exist, manage human affairs, and keep account of the actions of both virtuous and vicious individuals. He offers several brief arguments for these positions at *De legibus* 2.16. One of Marcus' primary arguments for the existence and divine provenance of the world comes from the order and regularity of the movements of heavenly bodies, which – he suggests – require reason. A second takes syllogistic form: everything that has reason is superior to those things that lack reason; nothing is superior to the universe; therefore, the universe has reason. Both arguments closely match Stoic proofs for the existence of the gods, and belong to a tradition of argumentation deriving from *Laws* 10.¹⁸ Marcus rounds off the prelude by discussing the social benefits of belief in the gods in a manner reminiscent of the Athenian Stranger's conclusion to *Laws* 10.¹⁹

Why does Quintus fail to notice that Marcus' prelude is in fact a summary of an important part of Plato's *Laws*? Throughout the dialogue, Quintus exhibits a tendency to value the Roman and legal more than the Greek and philosophical, and in fact he takes on a much larger role in the dialogue when the discussion turns to laws concerning magistracies in the third book.²⁰ For example, at the end of Book I Quintus becomes very excited when Marcus alludes to the Twelve Tables – the legal code that formed the bedrock of ancestral republican law – while attempting to settle the dispute between the Stoics and Peripatetics about the *sum-mum bonum*. “Excellent, brother! Now you are making use of the vocabulary of civil law and legal principles. I am eagerly awaiting your discussion about such matters” (*Leg.* 1.56). Marcus brushes off this request as an undertaking beyond his abilities and immediately shifts focus by launching into an extended encomium of philosophy (*Leg.* 1.58). Marcus and Quintus demonstrate that

¹⁸ For the argument from the order in the movements of heavenly bodies, see Cic. *Nat. D.* 2.43. For the syllogistic argument for the rationality of the universe from the superiority of the rational to the non-rational, see Cic. *Nat. D.* 2.21, which attributes the argument to Zeno. Several scholars have noted that the Stoic views in *De natura deorum* 2 are indebted in some fashion to Plato's *Laws* 10 (see D. Frede (2002) and Vogt (2008) 144–5, esp. 144 n. 72 and 145 n. 76). The relevant raw material in Plato's *Laws* is found between 10.893b and 10.905d.

¹⁹ Pl. *Leg.* 10.907c–910d. ²⁰ See Dyck (2004) 28.

they have different expectations for the direction of the conversation and what sources will be most relevant. They never reach an agreement about these matters during the three surviving books of the dialogue. In fact, in the third book Marcus scolds Quintus for overlooking the important lesson from Plato's *Laws* that the legislator must pay attention to both what is necessary and what is best (*Leg.* 3.26).²¹

Quintus' failure to detect the Platonic source for Marcus' prelude to the religious laws also leads one to wonder about what Marcus "said earlier," that is, his treatment of natural law in Book 1 and its precis earlier in Book 2. Has Quintus also neglected the Platonic provenance of natural law? And in fact, Marcus gently corrects his brother. He desires to imitate Plato and would even "translate his thoughts" (*sententias interpretari*) if he didn't also wish to be himself: "For what challenge is there in translating the same ideas using almost identical words?" (2.17). Marcus points out that in fact his project is a creative appropriation of Plato.²²

The dialogue itself, then, draws our attention to Marcus' handling of sources as we consider his treatment of natural law. In particular, four features of Marcus' treatment of sources require explanation: a creative appropriation of Plato that allows Marcus to be himself; a qualified agreement with Antiochus; a partial deferral of his own judgment to the authority of others; and a downplaying of his indebtedness to the Stoics. These facts suggest an undertaking of a rather complicated nature; and indeed, the first book of *De legibus* is as dense, complex, and multi-layered as any of Cicero's writings on political or ethical themes. My goal in the rest of this chapter is to reveal how devoting attention to Marcus' use of sources illuminates his highly nuanced and creative treatment of natural law. Although much of his argument is indebted to Stoicism, Marcus presents his treatment of natural law as a selective commentary on a Platonic theme refracted through

²¹ The Platonic passage is *Laws* 9.858a–c.

²² Caspar (2011) offers a reading of Cicero's *De legibus* that seeks to take seriously "the idea that Cicero, in writing his own book on the laws, undertook to supplement or correct, and perhaps even improve upon, Plato's teaching" (22). I don't disagree. My own approach differs from Caspar's, however, inasmuch as I stress that we cannot completely understand Cicero's teaching in his *Laws* without also coming to grips with his creative engagement with important earlier interpretations of Plato's philosophy.

an intelligent appropriation of the thought of two of his teachers who represented competing interpretations of Plato – Antiochus and Philo of Larissa. Ultimately, he illuminates the limits that the act of legislating places on the modes of enquiry available to the legislator.

Antiochus and the Platonic provenance of natural law

Marcus begins his discussion of law by offering a philosophical definition. In contrast to popular accounts of law, which focus on written legislation, he offers the following definition:

Law (*lex*) is the highest reason implanted in nature, which commands what is to be done and forbids the opposite. When this same reason has been strengthened and brought to completion in the human mind, it is law (*lex*). And so they suppose that law is intelligence whose force (*vis*) it is to command right action and forbid wrongdoing ... It is a force of nature; it is the mind and reason of the wise man; it is the rule (*regula*) for justice and injustice. (*Leg.* 1.18–19)

This definition of law closely follows the early Stoa and has been included by Von Arnim in his *Stoicorum Veterum Fragmenta*.²³ Indeed the definition draws on a couple of independently attested extracts from Chrysippus. Marcus' decision to base his account of justice on law, which in turn is defined as reason that is "strengthened and brought to completion in the human mind," brings to mind the discussion of justice in *On the Honorable*. "Justice (τὸ δίκαιον)," Chrysippus argued, "exists by nature (φύσει) and not by custom (θέσει), and the same is true of both law (νόμον) and right reason (ὁρθὸν λόγον)."²⁴ Marcus' identification of law (*lex*) as the rule for justice and injustice (*iuris atque iniuriae regula*) is a translation from the beginning of Chrysippus' *On Law*, which opens with the definition of law (νόμος) as "a standard for just and

²³ *SVF* 3.315. Indeed much of the first book of Cicero's *Laws* has also been included in the collection. Watson (1971) also holds that Cicero's position in Book 1 is fundamentally in agreement with the early Stoa.

²⁴ *SVF* 3.308. Cf. Cic. *Rep.* 3.27 = 3.33: *Est quidem vera lex recta ratio naturae congruens, diffusa in omnes, constans, sempiterna, quae vocet ad officium iubendo, vetando a fraude deterreat*. "True law is right reason in agreement with nature, spread through all peoples. It is constant and eternal. It calls to duty with its commands; it deters from wrongdoing with its prohibitions."

unjust actions” (κανόννα ... δικάίων καὶ ἀδίκων).²⁵ The complete definition goes as follows:

Law is king of all things human and divine. Law must rule over what is honorable and what is base, as a ruler and a guide, and as a result serve as a standard for just and unjust actions, prescribing for animals which are political by nature what ought to be done, and prohibiting them from what ought not to be done.²⁶

As this evidence indicates, the Stoic definition of law that Marcus is using specifies that law is a product of nature. The kind of law in view is natural law, which in fact is for the Stoics the only type of law worthy of the name.²⁷

However, despite his reliance on Stoicism for his definition of natural law, Marcus does not attribute this doctrine to the Stoics, but rather to “very learned men” (*doctissimi viri*; *Leg.* 1.18). Who are these men? The answer is provided somewhat later in the first book when Marcus uses similar terminology to refer collectively to the Stoics and Plato’s Academy. He refers to the disagreement between the Stoic Zeno and Plato and his followers (the “Old Academy”) concerning the highest good as a conflict among “very learned men” (*inter doctissimos*; *Leg.* 1.52). If, as I think likely, this second use of “very learned men” refers to the same people as the first, then in the former passage Marcus is suggesting that the source of his definition of law includes not just the Stoics, but also Plato and his followers. Marcus, it would seem, is attributing the Stoic definition of law to Plato. From where did he derive the inspiration to present the Stoic account of law as a Platonic teaching? Two pieces of terminology suggest the answer, which also provides further support for my suggestion that Marcus is portraying the Stoic account of law as the development of Platonic doctrine. Both the “Old Academy” and “very learned men” are terms distinctive of a particular philosopher whom Marcus’ philosophically inclined friend Atticus identifies immediately: Marcus’ teacher Antiochus of Ascalon (*Leg.* 1.54).²⁸

²⁵ *SVF* 3.314 = LS 67R. ²⁶ *SVF* 3.314 = LS 67R.

²⁷ *SVF* 3.324. As Asmis (2008) 3 rightly observes, the addition of “natural” or “of nature” to “law” is a redundancy for the Stoics.

²⁸ For the “Old Academy,” see below. For *doctissimi viri*, see Cic. *Fin.* 5.33. For the suggestion that Marcus’ use of *doctissimi viri* in *De legibus* points to Antiochus as

Antiochus was a member of Plato's Academy with whom Cicero studied in Athens for six months in 79 BC. Although initially he was a skeptic like the other followers of Plato at the time, he eventually broke free of the views of his teacher and head of the Academy – Philo of Larissa – and adopted a more dogmatic view of Plato.²⁹ Antiochus argued that his break from skepticism marked a return to the teachings of the “Old Academy” (*antiqua Academia*), which not only included Plato and his immediate successors within the Academy, but also Aristotle.³⁰ He was a syncretist who stressed the fundamental unity of the philosophies of Plato, Aristotle, and the Stoics.³¹ According to Antiochus, differences between these schools are simply matters of semantics. They involve terminology rather than content, *verba* rather than *res*.

Most of the evidence for this Antiochean position can be found in the writings of Cicero himself. His writings place particular emphasis on Antiochus' view that Stoicism is at base an “emendation” of Platonic doctrine. As Cicero's character explains in the *Academica*: “I think it to be true, as our friend Antiochus used to maintain, that Stoic doctrine should be considered an emendation of the Old Academy (*correctionem veteris Academiae*) rather than some new system.”³² In *De finibus* the character Piso, speaking from the Antiochean point of view, explains the derivative nature of Stoicism: “There remain the Stoics, who, although they had borrowed all of their philosophical doctrines from the Peripatetics and Academics, have given these very same doctrines different names.”³³ A little later in the same book, he returns to the theme:

The Stoics remain. They have not borrowed any one doctrine or another from us, but have appropriated the entirety of our philosophical system for their own use. And as other thieves change the marks on those goods which they have stolen, so they, in

the probable source, see Reitzenstein (1893) 7; Horsley (1978) 44; and Vander Waerdt (1994a) 4, 871.

²⁹ For accounts of the life and thought of Antiochus, see Glucker (1978) and Barnes (1989). It seems that Philo himself gradually moved towards dogmatism later in life.

³⁰ Cic. *Fin.* 5.7.

³¹ As Barnes (1989) 79 n. 103 aptly points out, “syncretist” more accurately describes Antiochus' standpoint than “eclectic.” His goal was the reconciliation of these different schools, not the creation of a new philosophy by appropriating select doctrines from each school.

³² Cic. *Acad.* 1.43. ³³ Cic. *Fin.* 5.22.

order to use our ideas for themselves, have changed the names (*nomina*) which are, so to speak, the marks of things.³⁴

Antiochus maintained this position even in ethics, where it would seem that the Stoic view that virtue is the only good conflicts with the Academic and Peripatetic view which recognized goods external to virtue. Undeterred, Antiochus argued that Zeno's goal was actually the defense of Plato's view of virtue: the Stoic doctrine of preferred and dispreferred indifferents simply represented a cumbersome and unwieldy way of stating what Plato had taught. Zeno "altered these doctrines not so much in substance as in vocabulary."³⁵

Returning once again to *De legibus*, the imprint of Antiochus is unmistakable. Marcus' arguments for natural law, though beginning from a Stoic vantage point, are designed to appeal to Platonists and Aristotelians as well as Stoics. After all, the Stoics "have changed the vocabulary while not changing the substance" of Plato's philosophy (*Leg.* 1.38). So intent is Marcus on demonstrating the compatibility of Stoicism and Plato's Academy that he even adopts the Antiochean approach to reconciling the apparent dispute over whether virtue is the only good.

If Zeno, like Aristo of Chios, had said that the only good was what was honorable and the only bad was what was dishonorable, that all other things were entirely equal, and that it did not make the least bit of difference whether they were present or absent, then he would be in a serious dispute with Xenocrates and Aristotle and that school of Plato, and there would be a difference of opinion among them about the most important matter and about the entire basis for ethics. But as it is, while the Old Academy said that the honorable was the highest good, Zeno says that it is the sole good; and likewise they said that vice is the greatest evil, while he says that it is the only evil. He calls wealth, health, and beauty advantageous things rather than goods, and poverty, weakness, and pain disadvantageous things rather than evils; he thinks the same thing as Xenocrates and Aristotle but communicates it with different language. From this disagreement – not in substance but in words – arose the dispute about ends. (*Leg.* 1.55)³⁶

³⁴ Cic. *Fin.* 5.74. ³⁵ Cic. *Acad.* 1.37.

³⁶ There are problems with this text, but its meaning is clear. For discussion of the problems, see Dyck (2004) 214. Though Zeno's name is not present in the text, he is clearly the subject of the first (conditional) sentence. Moreover, the protasis of the contrary-to-fact condition requires the pluperfect subjective form of *dico* in the place of (as in my translation) or in addition to (as in Powell's OCT edition) the perfect indicative that appears in the transmitted text.

Marcus, then, accepts the view that the Stoic concept of natural law is at base an emendation of Platonic theses. Moreover, his arguments in support of this concept are to be acceptable to Aristotelians, Platonists, and Stoics, who, despite appearances, are really in fundamental agreement. In maintaining these positions, Marcus is following his teacher Antiochus.

From right reason to natural right

Thus far, the influence of Antiochus has been limited to the *posture* that Marcus has adopted towards Stoic natural law teaching. But what about the *content* of this doctrine? Has Antiochus inspired Marcus to modify the orthodox Stoic view of natural law? It is time to take a close look at the content of Marcus' argument for natural law.

Strictly speaking, Marcus presents not one but two arguments for natural law in the first book of *De legibus*. The first runs from 1.18 to 1.34 and the second from 1.40 to 1.52. The two arguments have different styles and starting points. The first begins with the cosmic and the divine; the second with the human phenomenon of conscience. The first has the feel of a coolly argued proof; the second is more rhetorical.³⁷ We will focus our attention on the first.

As we have already seen, Marcus begins his argument by adopting a Stoic definition of law as “right reason” in place of the conventional understanding of law as written legislation. Law in this sense is natural, authoritative, and prescriptive. In particular, it is the standard (*regula*) of justice and prescribes the social good. In fact, Marcus attributes to the *doctissimi* the suggestion that there is a connection in Greek between “law” (νόμος) and “to distribute” (νέμω), which indicates that law is necessarily concerned with justice understood as giving to each his own (1.19). Why is there a connection between right reason, i.e., law according to the Stoics, and justice, the social virtue par excellence? After getting Atticus – an Epicurean who denies the divine governance of

³⁷ For further contrasts between the two arguments, see Benardete (1987) 303. I do not, however, follow Benardete's suggestion that the second argument undercuts the more dogmatic claims of the first.

the universe – to concede precisely this for the sake of argument, Marcus provides the framework in which to develop the answer by introducing another Stoic concept: the idea of the universe as a city of gods and men.³⁸

And therefore, since there is nothing better than reason and it is present in both a human being and a god, there exists a primordial partnership in reason between human beings and the gods. But those who share reason (*ratio*) also share right reason (*recta ratio*); and since this is law, we human beings also ought to be considered partners with the gods in law. Furthermore, among whom there is fellowship in law (*lex*) there also exists fellowship in justice (*ius*). But those for whom these things are in common must be held to belong to the same city. (*Leg.* 1.23)

As we may recall from Scipio's argument in *De republica*, law in the conventional sense serves as a bond between members of a community (*Rep.* 1.49). As it turns out, law conceived in the Stoic sense as right reason is also the bond of fellowship necessary for a community, albeit in this case the community is the universe rather than any city in the popular sense. As recent scholarship has demonstrated,³⁹ the Stoic view of reason is substantive. To have reason is not simply to be capable of applying some formal principles of reasoning, but involves possessing a certain degree of content about nature and how one should live. In particular, right reason prescribes for the rational members of the community of gods and men how to relate to one another as social and political animals. It was precisely this facet of right reason that was stressed in Marcus' initial definition of law as "a rule for justice and injustice" and subsequent comment on law's etymological connection to "distribution."

With this conception of law as a socially prescriptive norm and bond of a political community of rational beings, Marcus has already erected the skeleton of his argument. Given the Stoic conception of law as right reason, and the Stoic conception of a community of rational beings that includes human beings, the conclusion for which he is arguing follows: all human beings are

³⁸ The Stoic concept of the true city as a community of gods and men is well attested (Seneca, *De otio* 4.1 = LS 67K; Arius Didymus apud Eusebius, *Praep. evang.* 15.15.3–5 = SVF 2.528, part = LS 67L). For *De legibus* 1.23 as an accurate reflection of Stoic doctrine, see Schofield (1999b) 68–9.

³⁹ See e.g., M. Frede (1994); Schofield (1999b) 69–70; Vogt (2008) 161–216.

governed by natural right or justice.⁴⁰ This is even more evident at *Leg.* 1.33, where Marcus summarizes his preceding argument.

(1) Those who have been given reason by nature have also been given right reason; therefore, also law (*lex*), which is right reason in commanding and prohibiting; (2) and if law, then also justice (*ius*). (3) All human beings have reason; (4) therefore, justice has been given to all human beings.

Given the Stoic understanding of law as socially prescriptive right reason in accordance with nature that provides the standards of justice for a community of rational beings (1 and 2), and given that human beings are members of this community (3), it follows that nature determines what is just for all human beings. This line of argument should be familiar from *De legibus* 1.23. In fact, Marcus' first argument for natural law from *Laws* 1.18 to 1.34 can be seen as a type of ring composition. He begins with his initial Stoic definition of law, which allows him to formulate the argument at *Laws* 1.23. He then fleshes out this rather bare-bones argument by providing evidence that human beings are united in a community of rational beings before providing a formal restatement of the argument at *Laws* 1.33.

While the Stoic provenance of the components of the argument examined thus far is secure, there is more doubt about the source of the evidence supporting human rationality that Marcus provides between the formal statements of his argument. Paul Vander Waerdt has argued that Marcus is drawing on Antiochean material, which ultimately causes the argument expressed in the syllogism at *Laws* 1.33 to deviate from orthodox Stoicism. Under Antiochus' influence, Marcus "has adapted a series of orthodox Stoic arguments to support the unorthodox thesis that all human beings are capable of living according to natural law."⁴¹ However, while there is evidence to suggest that Antiochus was the source

⁴⁰ I use the terms "right" and "justice" interchangeably. One should not confuse "right," the focus of Marcus' argument here, with the concept of "rights," which Scipio elaborates in his discussion of political society in *De republica* (for which, see [Chapter 4](#)). Here Marcus clearly has the more broad sense of *ius* as justice in mind.

⁴¹ Vander Waerdt (1994a) 4.874. Dyck (2004) 125 reports (though does not necessarily endorse) the views of Vander Waerdt and David Duane Mehl, the latter of whom has suggested that Cicero himself is responsible for this modification. See further Mehl (1999) 131.

for Marcus' discussion of human rationality,⁴² this evidence points to no such substantive modification to Stoic orthodoxy on behalf of Antiochus or Marcus, at least in the first book.

Marcus presents the evidence for human rationality in two stages. In the first stage, he discusses the qualities with which nature has endowed human beings (*Leg.* 1.24–7). He then presents evidence that human rationality constitutes a bond between human beings and directs them to develop the social virtues (*Leg.* 1.28–32). His arguments in both stages are consistent with both the philosophy of Antiochus and orthodox Stoicism.

Marcus begins his argument by surveying natural qualities common to all human beings. He divides these qualities into two types: those belonging to the body and those belonging to the mind (*Leg.* 1.26). Regarding the former, he points out that man's upright posture sets him apart from the beasts and encourages contemplation (*Leg.* 1.26). Likewise he has been given senses to aid the acquisition of knowledge, facial expressions to help transmit this knowledge, and – above all – the endowment of speech, “the greatest promoter of human society” (*Leg.* 1.27). With respect to the latter, nature has equipped man with a keen mind that works with the senses to strengthen and complete reason, taking primary inchoate conceptions (*inchoatae intelligentiae*) as its starting point (*Leg.* 1.27).

All this is standard Stoic doctrine, and in fact, there exists a very close parallel in the second book of Cicero's *De natura deorum* – the book devoted to a presentation of Stoic theology – at 2.140–62. In particular, the importance given the faculty of speech for promoting human society is emphasized both at *De natura deorum* 2.148–9 and *De officiis* 1.50. Moreover, *intelligentia*, which appears at *Leg.* 1.26, 27, and 30 is Cicero's translation of *ἐννοια*, the Stoic term for the initial preconceptions which develop through the proper use of the senses.⁴³

Marcus' basic line of argument can be found in Antiochus' thought as reported by Cicero in the first book of the *Academica*

⁴² For detailed treatments of the evidence for an Antiochean source for these arguments, see Reitzenstein (1893) and Horsley (1978).

⁴³ See Cic. *Fin.* 3.21 and *SVF* 2.33. See also Dyck (2004) 138.

and the fifth book of *De finibus*. Like Marcus, Antiochus begins his discussion of human qualities in an attempt to determine “what the nature of man is, for this is the subject we are investigating.”⁴⁴ And like Marcus, Antiochus divides human qualities into those which pertain to the mind and the body.⁴⁵ His enumeration of the qualities of the body also emphasizes those given the most attention by Marcus: the senses and power of communication.⁴⁶ The goods of the mind include such qualities as the keenness of mind in learning and remembering. These components comprise “philosophy itself,” which starts from a beginning (*inchoatum*) and progresses to virtue, which is reached when its nature, that is, reason, has been perfected.⁴⁷ This process is described in greater detail in *De finibus* 5.59, which presents Antiochus’ account of the strengthening of reason and the development of the virtues from *inchoatae intellegentiae*.⁴⁸

After concluding his survey of natural human qualities, Marcus turns in the next section of his exposition to explain how these qualities constitute man’s rational nature, which in turn prescribes the social virtues. Due to the many similarities with the Antiochean account of human fellowship and society at *De finibus* 5.65–6,⁴⁹ Antiochus is most likely Marcus’ source for this part of the argument.⁵⁰ According to the account in *De finibus*, Antiochus argued that the sense of unity that human beings possess as members of a single community of rational beings leads to the development of the social virtues. Like both Aristotle⁵¹ and Chrysippus,⁵² Antiochus suggested that man is by nature a social animal. His natural qualities promote political society and virtue, the latter of which Antiochus seems to have understood as perfect or complete reason.⁵³

Marcus, like Antiochus and Aristotle, argues that there is a fellowship among men. Human beings have a natural impulse to

⁴⁴ Cic. *Fin.* 5.34. Cf. Cic. *Leg.* 1.17. ⁴⁵ Cic. *Acad.* 1.19–20 and Cic. *Fin.* 5.34.

⁴⁶ Cic. *Acad.* 1.20 and Cic. *Fin.* 5.34–6. ⁴⁷ Cic. *Acad.* 1.20.

⁴⁸ On the strength of *De finibus* 5.59, Dyck (2004) 138 concludes that Antiochus, himself depending upon Chrysippus, is the source for Cic. *Leg.* 1.26.

⁴⁹ On this passage, see now Schofield (2012) 176–82.

⁵⁰ See Horsley (1978) 49 and Vander Waerdt (1994a) 4,877.

⁵¹ See Arist. *Pol.* 1.2.1253a. ⁵² See *SVF* 3.314 = LS 67R.

⁵³ See Cic. *Acad.* 1.20.

society that results in the virtues when developed rationally.⁵⁴ In particular, reason commands men to practice justice, the social virtue par excellence and the glue of society.⁵⁵ Antiochus specifies that justice involves giving to each his own, which is of course the very conception of justice prescribed by Marcus' Stoic conception of law as right reason.⁵⁶ Connected with this sense of justice are other virtues stemming from the natural impulse to society such as piety (*pietas*), kind-heartedness (*bonitas*), liberality (*liberalitas*), benevolence (*benignitas*), and friendliness (*comitas*), or, following Marcus' version of the list in *De legibus*, friendliness (*comitas*), benevolence (*benignitas*), gratitude (*gratus animus*), and mindfulness of generosity (*memor benefici*).⁵⁷ Drawing on the argument of the preceding section, Marcus emphasizes that *all* human beings possess those inchoate conceptions from which nature, strengthening and perfecting their reason, will lead them to perfect rationality (*Leg.* 1.30; cf. *Leg.* 1.27). Since to act completely in accordance with reason is to act virtuously, he concludes that "there is no person of any nation who, having acquired a guide, cannot attain virtue" (*Leg.* 1.30).

It is this last statement that has suggested to some scholars that Marcus, under the influence of Antiochus, has altered Stoic doctrine by diluting the demands of natural law to bring it within the reach of the commoner as well as the sage. A departure from Stoic orthodoxy at this point would also explain why Marcus later deduces in the first premise of the syllogism at *Laws* 1.33 (reproduced above) that all "who have been given reason have also been given right reason": he has relaxed the commands of right reason and so has made it possible for any rational being to obey them.⁵⁸

But what precisely does orthodox Stoicism teach on this matter? According to the Stoics, only god (or the cosmos) is endowed "from the outset" with "right reason (*ratio recta*) and consistency." Human beings differ from the cosmos in that they are endowed with reason at birth, but this reason is not yet perfect

⁵⁴ Cf. Cic. *Leg.* 1.30 and Cic. *Fin.* 5.43.

⁵⁵ Cf. Cic. *Leg.* 1.28 and Cic. *Fin.* 5.66. See also Arist. *Pol.* 1.2.1253a.

⁵⁶ Cf. Cic. *Fin.* 5.65 and Cic. *Leg.* 1.19. See also Horsley (1978) 49.

⁵⁷ Cf. Cic. *Fin.* 5.65 and Cic. *Leg.* 1.32. ⁵⁸ See Vander Waerdt (1994a) 4,872–3.

and absolute.⁵⁹ Insofar as a man is “some small component of that which is perfect,” he falls under the perfectly rational administration of the cosmos, even if his own understanding of the workings of the whole is limited. Man is charged by nature with understanding and imitating the perfectly rational universal nature of which he is a part.⁶⁰ Each person has a natural impulse to virtue so that, provided proper development, he or she will attain virtue under the guidance of nature.⁶¹ However, the Stoics emphasized that although all human beings share a common starting point, almost no one will attain virtue. Human beings respond to nature’s guidance imperfectly; indeed, some may become so perverted through deception and their development hindered to such an extent that they are beyond hope.⁶²

Marcus’ account accurately reflects these Stoic views.⁶³ Because nature has endowed all human beings with the same initial conceptions and directs all men to follow reason which enjoins sociality, all may attain virtue. Like the early Stoics, his argument holds that all human beings share the same starting point and the same goal, which they may attain *provided* that they follow nature’s guidance. The condition is of great importance. The early Stoics thought that the overwhelming majority of human beings lived lives of ignorance and error: the sage who perfectly followed nature’s guidance and attained perfect rationality was rarer than the Ethiopian Phoenix. Marcus shares this view. He notes that the remarkable similarity of the human race is evident in common vices (*Leg.* 1.31–2).⁶⁴ While human beings as (imperfectly) rational beings all possess perfect or right reason as the goal (*Leg.* 1.33),⁶⁵ the vast

⁵⁹ Cic. *Nat. D.* 2.34. ⁶⁰ Cic. *Nat. D.* 2.37–8.

⁶¹ See *SVF* 1.566; *SVF* 3.264; *DL* 7.89; and Cic. *Nat. D.* 2.39.

⁶² See *DL* 7.89 and *SVF* 3.519.

⁶³ Other scholars who have come to this conclusion include Asmis (2008) 9–11 and Mitsis (1994), the latter of whom is responding to Vander Waerdt (1994a). Mitsis (1994) 4.842 n. 81 concludes: “I see no reason for claiming that *De Legibus* 1.30 is an important departure from what we see in *De Finibus* 4.56 or in the early Stoa. The early Stoics think that while everyone has the correct natural starting points, some become too corrupt to attain virtue, while others can follow a wise preceptor ... Cicero’s account correctly reflects these early Stoic views.”

⁶⁴ Marcus seems to draw on Antiochus for portions of this account of human error as well. In particular, both he and Antiochus emphasize the difficulty of distinguishing between honor and glory (cf. Cic. *Leg.* 1.32 and Cic. *Fin.* 5.69).

⁶⁵ See also Asmis (2008) 9–10.

majority fail to attain this goal because they are tripped up by the numerous snares set for their minds (*Leg.* 1.47).

It appears, then, that though Antiochus was the source for Marcus' discussion of human rationality, the latter's argument for the existence of natural right is largely in agreement with Stoic orthodoxy. The influence of Antiochus on Marcus lies not in the revision of Stoicism but in its appropriation for the Academy in the name of returning to Plato.

Skeptical fingerprints

But why does Marcus treat natural law from this Antiochean perspective? Why take pains to present Stoicism as an elaboration of Platonism that is also compatible with the philosophy of Aristotle? In order to answer these questions, we must first return to an earlier observation about Marcus' relationship with Antiochus. Despite his clear dependence on, and effusive praise for, his teacher, Marcus refuses to endorse without qualification Atticus' belief that he is in agreement with Antiochus.

ATTICUS: Therefore, you agree (*assentiris*) with Antiochus, my friend ...

MARCUS: Indeed that man was wise and sharp – in his own class supreme – and a friend of mine, as you know. Nevertheless, whether or not I give my assent to all of his teachings (*assentiar in omnibus*) remains to be seen. (*Leg.* 1.54)

The terminology provides a clue to understanding the reason for Marcus' caveat. The word that I have translated "agree" and "assent" in the exchange between Marcus and Atticus happens to be Cicero's preferred technical term for expressing the Stoic teaching that one may assent to convincing impressions, a conclusion which the dogmatic Antiochus accepted and the skeptical Academy rejected.⁶⁶ As I pointed out in [Chapter 1](#), Cicero was a lifetime adherent to the teachings of the skeptical Academy. By refusing to give his unqualified assent to Antiochus' teachings, Marcus reminds Atticus (and the reader) that, despite the fact that he finds his teacher's account of natural law useful, he nevertheless remains a skeptic.

⁶⁶ See Cic. *Acad.* 2.11–39.

The suggestion that Marcus maintains his skepticism may surprise many readers, for scholars have long viewed *De legibus* as a dogmatic work. Enlightenment thinkers such as Hugo Grotius, Samuel Pufendorf, and George Turnbull treated Marcus' arguments for natural law as a worthy counterweight to the skeptical arguments of the great head of the Academy, Carneades, whose views they believed anticipated the skepticism of their own era.⁶⁷ Some recent commentators have gone further to suggest that Cicero must have defected from skepticism prior to composing his *Laws*.⁶⁸ Part of the reason for this thesis, of course, is that Marcus endorses the fundamentally Stoic theory of natural law, which we have just examined. But more than this, he also presents the New Academy as posing a threat to his current project.

However, as for the disturber of all these matters, this New Academy from Arcesilaus and Carneades, let's prevail upon it to be silent. For if it launches an assault against these things which appear to us neatly prepared and composed, it will produce excessive destruction. I desire to placate it; I do not dare send it away. (*Leg.* 1.39)

John Glucker, one of the proponents of a Ciceronian conversion to dogmatism, comments: "It is not just that Cicero does *not* represent himself as a 'New' Academic; he criticizes the 'New' Academy as severely as only an outsider can do (although also as respectfully as only an old alumnus would)."⁶⁹ However, a close examination of Marcus' presentation of natural law in *Laws* 1 reveals the fingerprints of a skeptic.

First, just as Marcus had earlier qualified his agreement with Antiochus, so here he qualifies his disagreement with the New Academy. He does not completely dismiss the New Academy, but rather is concerned with limiting its potential for destruction. In particular, he seems to have in mind the tendency of members of the New Academy to dismantle the various available positions on a particular issue while adopting no positive views themselves. This exercise in pure dialectic, adopted by Arcesilaus and perfected by Carneades, contributes nothing towards the sort of

⁶⁷ See Tuck (1983) and Tuck (1999).

⁶⁸ See Glucker (1988) and Steinmetz (1989). On this account Cicero ultimately apostatized from his new faith and returned to skepticism during the final decade of his life.

⁶⁹ Glucker (1988) 49–50.

positive legislative project that Marcus is undertaking.⁷⁰ It only has the potential to undermine the philosophical underpinning for the laws of the city. However, a departure from the usual New Academic procedure does not entail a departure from the skeptical Academy altogether. As we will see, the New Academy developed another method of philosophical investigation – one that is potentially more compatible with the goals of the legislator. It may still be possible for Marcus to fulfill his desire to placate the New Academy.

Second, note that Marcus openly acknowledges the vulnerability of his position. If powerful skeptics such as Carneades are allowed to unleash their fusillade of objections at his account of natural law, he admits that it will crumble and undergo “excessive destruction.” One would not expect such an admission of vulnerability from a dogmatist.

Finally, Marcus provides a couple of careful caveats at the outset of his discussion of natural law. The philosophers whose treatment of law he is borrowing are “probably right” to begin their discussions of justice by defining law (*Leg.* 1.18). Shortly thereafter, he adds: “And so if these ideas are right, as I tend usually to think (*ut mihi quidem plerumque videri solet*), then it is rightly maintained that the beginning of justice is to be sought in law.”⁷¹ Even proponents of a Ciceronian conversion to dogmatism concede that “as I tend usually to think” indicates an acknowledgement that nothing which can be counted as knowledge is immune from later correction, improvement, or modification.⁷² As Woldemar Görler has pointed out, this is very much a part of what Cicero means by skepticism. And in fact, skeptics also used the locution *ut mihi videtur* to signal the uncertainty of sense perception.⁷³ Hence “as I tend usually to think” (*ut mihi quidem plerumque videri solet*) “surely is a skeptical caveat.”⁷⁴

⁷⁰ See also Lévy (1992) 515–16.

⁷¹ Cic. *Leg.* 1.19: *Quodsi ita recte dicitur, ut mihi quidem plerumque videri solet, a lege ducendum est iuris exordium.*

⁷² See Steinmetz (1989) 8.

⁷³ See Cic. *Acad.* 2.79–89 with Augustine, *Contra Academicos* 2.26.

⁷⁴ Görler (1995) 103.

The preceding evidence suggests that it is a mistake to construe *De legibus* as a dogmatic work. However, these skeptical fingerprints immediately raise a question: does Marcus offer an account of how his use of Stoic arguments for natural law is consistent with his skepticism? Readers familiar with Cicero's philosophical writings might expect him to feel obliged to address the issue. After all, he did take the time to do so in *De officiis*, his later treatment of ethical and political concerns that also made liberal use of Stoicism to advance positive views. In that work he stressed that as an Academic skeptic he was free to exercise his own judgment in following the Stoics for the moment on the matter of practical ethics.⁷⁵ As we will see, *De legibus* too contains an account of how the use of Stoicism may be compatible with skepticism. And a key component of this account will be Antiochus' view that Plato and Aristotle and the Stoics all are in fundamental agreement about the validity of natural law.

Philo, Carneades, and the criterion of the persuasive

Antiochus was not Cicero's only teacher within the Academy. In 88 BC Philo of Larissa fled Athens for Rome due to political unrest, and Cicero enthusiastically attended his lectures.⁷⁶ At the time Philo was the current head of the skeptical Academy, having succeeded his teacher Clitomachus. Only seven or so years had separated the election of the latter as scholarch from the death of Carneades, perhaps the greatest of all the skeptical followers of Plato.⁷⁷ In fact, by the time of Philo's arrival at Rome, a large portion of the intellectual activity in the Academy was devoted to interpreting the views of Carneades. Clitomachus portrayed Carneades as a pure dialectician holding no positive views himself.⁷⁸ This is the purely deconstructive mode of skeptical enquiry

⁷⁵ Cic. *Off.* 1.6.

⁷⁶ See Cic. *Brut.* 306. For a good discussion of the available evidence for constructing Philo's biography, see Brittain (2001) 38–72.

⁷⁷ For the chronology, see Brittain (2001) 45–6.

⁷⁸ Cic. *Acad.* 2.78. The centrality of dialectical maneuvers against the Stoics to the thought of the New Academy is emphasized by Sedley (1981); Sedley (1983); and Couissin (1983).

that Marcus seems eager to keep at arm's length in *De legibus*. However, Philo eventually came to hold a different interpretation of Carneades' method which ascribed to the great skeptic a method of examining positions that allowed for positive views. Instead of arguing against both sides of any issue, Carneades on Philo's account employed a fallible criterion for testing sense perceptions.⁷⁹ It is this second version of Carneades' philosophical method that Marcus utilizes in *De legibus*.

At the conclusion of his first argument for natural law, Marcus takes some time to reflect on methodology. Although additional argumentation will be needed to satisfy certain unnamed philosophers who insist that such points be argued piecemeal, he himself prefers the method of the old schools (*veteres*) who argued the same points copiously and freely (*fuse ... et libere*; *Leg.* 1.36). Atticus immediately parlays this comment into a jab at Marcus for what he perceives to be an inconsistency. He uses his friend's mention of his preference for arguing "freely" to shift the focus to Marcus' adherence to the methodology of the New Academy, which emphasizes "the freedom of argumentation" (*libertas disserendi*). Noting that Marcus has been relying heavily on sources, Atticus says: "Clearly you have given up your freedom in debating (*libertas disserendi*). Or are you the sort of person who does not follow your own judgment (*tuum iudicium*) in arguing a case, but obeys the authority of others?" (*Leg.* 1.36).

What does "freedom" (*libertas*) entail for Marcus? The passage at *Laws* 1.36 and following suggests that freedom here implies that one is not tied down to any particular school, but is free to exercise one's own judgment.⁸⁰ According to Atticus, Marcus has lost his freedom precisely because he has rested upon the authority of another rather than exercised his own judgment. Marcus accepts this definition of liberty, which he assumes in his response.

Not always, Titus; but you see what path this speech is following: our entire discussion is devoted to strengthening republics, that is, to stabilizing commonwealths and making peoples healthy. Therefore I am afraid lest I commit to principles which are

⁷⁹ See Sedley (1981) 71 and Hankinson (1995) 94.

⁸⁰ See Cicero, *De officiis* 1.6, where Cicero likewise stresses his freedom as an Academic to exercise his own judgment (*iudicium*).

not well considered (*bene provisā*) and diligently examined (*diligenter explorata*). Not that they should be approved (*probentur*) by all (for that is impossible), but that they may be accepted by those who have held that everything morally right and honorable is to be sought for its own sake and who have held either that nothing at all is to be placed in the class of good things except that which is praiseworthy in itself or at least that nothing is to be considered a great good unless it truly is able to be praised for its own sake. (*Leg.* 1.37)

Marcus' reply to Atticus presents a very careful and nuanced statement of his approach to the task at hand given his Academic skepticism. His initial response, "Not always," is not surprising. As an Academic skeptic, Marcus places a premium on exercising one's own judgment. However, the next sentence qualifies his answer and explains why he finds it necessary to follow a source in this instance. He chooses to follow a source – and in this way surrenders his judgment – because of the immense importance of the matters under investigation. Indeed the subject of their investigation is what for Cicero is among the greatest matters in philosophy and, indeed, the whole of life: the health and preservation of the *res publica* (*Rep.* 1.1–2, 12, 33, 38; 3.4 = 7; *Leg.* 1.28). Speaking in his own voice, Cicero remarks in *De republica*: "The establishment of a commonwealth capable of existing for a very long time requires by far the greatest judgment in the world!" (*Rep.* 3.4 = 3.7).

Because of the difficulty of the subject under investigation, Marcus wants to proceed carefully. He will take special care that the first principles (*principia*) upon which his argument rests are "well considered" (*bene provisā*) and "diligently examined" (*diligenter explorata*). He has carefully chosen his words in order to align his methodology with the specifications of Academic skepticism as embraced by Carneades according to Philo's interpretation. More precisely, he seeks to show that his procedure in *Laws* I meets the criterion for conducting one's life that Carneades was "compelled" to produce.⁸¹

According to Carneades, there are three possible movements for the soul: impression, impulse, and assent. Impression leads to impulse and impulse moves an individual to action. Thus

⁸¹ Sext. Emp. *Math.* 7.166 = LS 69D.

impression and impulse are all that an individual needs to act. Indeed, the third movement of the soul, assent, should be avoided because it is at this stage that falsehood and deception are engendered.⁸² Hence a rational person will avoid the third step, opining, and will act by following those impressions that are convincing (*probabilia*, *πιθανά*).⁸³ However, in following impressions, one is not passive, but instead the individual will put the impression through a series of critical and rational tests, similar to the cross-checking of witnesses in court or the diagnosis of illness by a doctor. While the enquirer can never exclude the possibility that an impression is false, he can become more convinced by a given impression that has passed a series of tests.⁸⁴

The more difficult or important the matter under review is, the greater scrutiny the impression must receive with the goal of following an impression “which is simultaneously convincing and undiverted and thoroughly explored.”⁸⁵ We find Carneades’ position explained by Sextus Empiricus as follows:

For all of these in turn become the criterion – the convincing impression, and the one which is simultaneously convincing and undiverted and, in addition to these, the one which is simultaneously convincing and undiverted and thoroughly explored. For this reason, as in everyday life when we are investigating a small matter we question a single witness, but in the case of a larger one several, and in a still more crucial matter we cross-question each of the witnesses from the mutual corroboration provided by the others – so, say Carneades and his followers, in matters of no importance we make use of the merely convincing impression, but in weightier matters the undiverted impression as a criterion, and in matters which contribute to happiness the thoroughly explored impression.⁸⁶

In especially difficult and weighty matters, the impression must be both convincing and scrutinized. Before following an impression in an extremely important matter, Cicero, following Carneades, reports that the wise man will make sure that he has examined the matter most diligently (*circumspicere diligentissime*).⁸⁷ This, one should note, is precisely the sort of approach that Marcus is

⁸² See Plut. *Adv. Col.* 1122A–F = LS 69A. ⁸³ See LS 69D.

⁸⁴ See Sext. Emp. *Pyr.* 1.226–8. See also Schofield (1999d) 348–9.

⁸⁵ Sext. Emp. *Math.* 7.176–84 = LS 69E; cf. *Pyr.* 1.227–8.

⁸⁶ Sext. Emp. *Math.* 7.184 = LS 69E (trans. Long and Sedley).

⁸⁷ Cic. *Acad.* 2.36.

commending in carrying out the important matter of determining appropriate foundations for the legislation of the *res publica*. In some places one must be very careful and take extra precaution. This is just such a place. Therefore, as Carneades recommends, Marcus must make every effort to ensure that his arguments are “diligently examined” (*diligenter explorata*; *Leg.* 1.37).

How will Marcus do this? How will he find sufficient witnesses to allow him to adjudge his argument as the most persuasive? The answer is perhaps surprising. He explains:

All these philosophers – whether they have remained in the Old Academy with Speusippus, Xenocrates, and Polemo; or whether they have followed Aristotle and Theophrastus (agreeing with the Academics in substance, though differing slightly in their method of teaching); or whether, like Zeno, they have changed the vocabulary while not changing the substance; or even whether they have followed the difficult and demanding, but now broken and refuted, school of Aristo and hold everything to be completely equal with the exception of virtue and vice – all these philosophers approve of (*probantur*) the arguments that I have set down. (*Leg.* 1.38)

In his earlier explanation to Atticus of why and how he has surrendered his freedom of judgment (*iudicium*), Marcus had responded by stating that he wished to put down arguments that “should be approved (*probentur*)” by all good philosophers (*Leg.* 1.37). He makes the same point here. The verb that he uses for approval in both passages is *probare* – to “accept” or “approve” – which happens to be the very same word that Cicero commonly uses to express Carneades’ doctrine of “the wise person’s ‘acceptance’ of convincing impressions without assent.”⁸⁸ Marcus suggests that it is the Antiochean doctrine of the unity of the schools that allows him to adduce evidence worthy of approval. According to Carneades’ criterion of the plausible, one must thoroughly investigate difficult matters by rounding up all of the witnesses before giving one’s approval. If any significant witness or piece of evidence does not agree with the others, the percipient will have good reason to reject the impression.⁸⁹ By obtaining the

⁸⁸ Schofield (1999d) 350. See also Brittain (2001) 15 n. 20.

⁸⁹ As in the case of Admetus, who refused to accept the (true) impression that Alcestis was appearing to him because he also had the belief that she had died. In such a case, the impression becomes diverted (*ἀπερίσπαστος φαντασία*), and one is not warranted in accepting it even if it turns out to be true (Sext. *Emp. Pyr.* 1.228).

agreement of nearly all of the philosophers who have considered the matter at length, Marcus is achieving the “mutual corroboration” of witnesses.⁹⁰ This is precisely what his skeptical commitment requires of him in the difficult matter of determining the foundations of justice.

It is now possible to understand how Marcus’ use of the Stoic material is guided by his Academic skepticism. Because of the importance of the issue under investigation, he chooses to *follow a source*, thus surrendering his free judgment (*liberum iudicium*). Yet there is also a sense in which Marcus does exercise his own judgment (*iudicium*), and for this reason he refuses to allow that he has completely followed the authority of another (*Leg.* 1.36–7). Because of the importance of the issue under investigation, he *chooses* to follow a source, thus in a manner of speaking exercising his free judgment (*liberum iudicium*).

The preceding account was complex, but I believe it best accounts for the skeptical fingerprints as well as the dialogue’s constant references to Marcus’ use of sources. In particular, we are now able to offer an explanation for the four features identified earlier in the chapter. As a member of the skeptical Academy, Marcus appropriated a method of investigation that his teacher Philo had attributed to Carneades. Because this methodology is guiding his treatment of natural law, any agreement with dogmatists such as Antiochus and the Stoics will have to be qualified. Carneades’ criterion for rendering a given position convincing requires a canvassing of witnesses which Marcus fulfills in the case of natural law by stressing an Antiochean consensus among philosophers. By relying on these witnesses, Marcus is partially deferring to the authority of others. And by drawing on the thought of two Academics, Philo and Antiochus, to deal with a topic he inherited from Plato’s *Laws*, Marcus’ treatment of natural law certainly seems to be the creative appropriation of Plato that he describes to Quintus at *Laws* 2.17.

Perhaps some may find such a delicate appropriation of two competing interpretations of Plato’s philosophy surprising. But placed within the broader context of Cicero’s philosophical

⁹⁰ See Sext. Emp. *Math.* 7.176–84 = LS 69E.

writings, it should not be unexpected. Speaking of Cicero's philosophical allegiances with reference to his moral and political writings as a whole, A. A. Long writes:

Cicero does not espouse Antiochus' Stoic epistemology. But this other Academic ... was probably the strongest contemporary influence on Cicero's moral thought. His Philonian scepticism is entirely compatible with choosing theories that, on examination, he finds the most plausible or probable. This dual allegiance to Philo and, with qualification, to Antiochus, is a highly intelligent interpretation of the Academic tradition. It allows Cicero to draw heavily on Plato and Stoicism, in advocating positions he strongly supports, while preserving an exploratory rather than dogmatic style, and reserving the right to criticize Stoics and even Plato on occasion.⁹¹

By creatively borrowing from both Antiochus and Philo in his *Laws*, Cicero is simply drawing on the Academy's repository of interpretations of Plato in a fashion that will continue to serve him well for the next decade.

Legislation and the limits of philosophy

A final question remains. Marcus argues that he has decided to summon the testimonies of philosophical witnesses because a task as important as providing a secure foundation for the laws of the city requires a careful investigation. If the subject is as important as Marcus suggests, then presumably it is just as important to make every effort to arrive at the best answer. One might expect, then, a more open dialogue that provides a rigorous philosophical examination of justice and right by providing space for all of the strongest available arguments. While he adopts this approach in his later "Academic" dialogues, Cicero of course eschews the approach here. Instead, Marcus chooses for his means of investigation an appeal to a consensus of philosophers. He begins his first argument for natural right by requesting that Atticus refrain from offering any Epicurean objections to the teleological cosmology that undergirds his account of the city of gods and men (*Leg.* I.21). At its conclusion, he demands that both the Epicureans and the skeptics refrain from entering the debate (*Leg.* I.39). Given

⁹¹ A. A. Long (2003) 199.

the importance of his task, why does Marcus choose a method of establishing secure foundations for the laws that is restrictive of the type of arguments that may be employed?

The solution is suggested by one of a number of epistemological considerations guiding Marcus' method of testing in the first place. Members of the New Academy emphasized that sensitivity to the type of object to be investigated was essential when determining which methods to employ. One example used to illustrate the point is especially relevant. If a person sees an object lying coiled in a dark room and wants to discover whether it is a rope or a snake, he had better adopt a means of testing this appearance suitable for the situation. For example, he might decide simply to wait for a while so that he can see whether the object moves and can discern its features more clearly after his eyes have become adjusted to the dark. However, he had better not pick up the object, even though that would be the quickest and surest way of finding out its identity. Though such a means of testing would most effectively and completely settle the question, only a fool would employ a method that may prove fatal.⁹²

Similar considerations guide Marcus' decision to turn to a philosophical consensus for natural right. In this case, the object under investigation is the foundation for the laws of the city. The very effectiveness of this foundation as a support for a stable and long-lasting commonwealth depends on its ability to avoid violent and radical change. To unleash the full force of philosophical argumentation against the foundations of the city may do irreparable harm.⁹³ The type of enquiry available to the legislator is limited by his role as *legislator*, that is, as one responsible for finding methods of defending the city that do not harm it in the process. And so Marcus must limit his selection of arguments to those that

⁹² Sext. Emp. *Pyr.* 1.227–8.

⁹³ For a rather different approach from Cicero's, see John Locke's *Questions Concerning the Law of Nature*, Question VII. Locke launches a withering assault against the argument for natural law from the consent of all, including Marcus' strategy of canvassing the opinions of philosophers: "How does it help to turn to the philosophers? Varro enumerates for them more than two hundred opinions concerning the highest good, and there cannot be fewer opinions about the way that leads to happiness; that is, about the law of nature" (Question VII. fol. 78, lines 1–4). I am grateful to Diskin Clay for bringing this passage to my attention.

are suited to his task. As a legislator, he must, for the good of the city, keep at bay arguments that he suspects may succeed in upsetting the city. This is not the last time that Cicero would defend a view susceptible to rigorous philosophical scrutiny because he judges it to be salutary for the commonwealth. In his later work *De divinatione*, Cicero argues that auspices should be retained even in the face of strong philosophical criticism because of their great advantages for the commonwealth (*ad magnas utilitates rei publicae*).⁹⁴

Ultimately Marcus' handling of the Stoic arguments for natural law suggests that the prudent legislator must observe the limitations that the act of legislating places on philosophical enquiry. If the philosophical legislator is to serve the city's interests, he must modify or dilute arguments and philosophical principles to bring them into conformity with the city's needs. He may even have to dismiss arguments that resist modification or dilution. The legislator's chief allegiance must be to the city.

If the task of the philosophical legislator is to harness philosophy so that it serves the needs of the city, how well does Marcus, the philosophical legislator of *De legibus*, carry out this task? In particular, how does he plan to deploy the Stoic argument for natural right to the advantage of the city? How does he intend to connect natural law and written legislation? To these questions we now turn.

⁹⁴ See Cic. *Div.* 2.70.

CHAPTER 6

LEGISLATION FOR THE BEST PRACTICABLE REGIME

In the previous chapter, I argued that Marcus provided a reasonably orthodox Stoic account of natural law in the first book of the *Laws*. Properly understood, law is the “highest” or “right” reason, whose directives nature bids all human beings to follow even though few – if any – will successfully do so. With the exception of the prologue to Book 2, the rest of the dialogue is devoted to the discussion of detailed legislation. Book 2 focuses on religious laws, while the subject of Book 3 is constitutional law, that is, laws relating to the arrangement and powers of magistracies in the state. Commentators have found the relationship between these particular laws and the account of natural law in Book 1 to be obscure.¹ Is Cicero able to connect these different treatments of law in a philosophically satisfying manner? On this key question rests the philosophical and literary coherence of the entire work.

The success of Cicero’s project will turn out to depend upon his ability to negotiate many of same five contraries and tensions familiar from his *Republic*, namely, the general and the particular, the rational and the irrational, the divine and the human, the best conceivable and the best practicable, and the philosophical and the political (see especially [Chapter 2](#)). To these, *De legibus* adds a formidable sixth pair: the conventional (or customary) and the natural. In fact, the tension between this final pair of concepts boiled beneath the conversation of the *Republic*, occasionally rising to the surface. Now it erupts into the center of the investigation. Cicero must demonstrate how the natural, rational, divine, and ideally best may purchase authority for the customary, irrational, human, and best practicable. The difficulties of his task become clearer in light of earlier treatments of the relationship

¹ For doubts about the philosophical coherence of *De legibus*, see Zetzel (1999) xxiii; E. M. Atkins (2000) 498–502; Dyck (2004) 238; Inwood and Miller (2007) 140–7.

between nature, custom, and law by the philosophers whose influence on *De legibus* is most palpable – Plato and the Stoics. The first section of this chapter, therefore, examines their respective views of the connection between natural law and the laws of conventional states. The rest of the chapter will track Cicero's own response, which unfolds gradually as Marcus and his interlocutors turn from their treatment of natural law to discuss legislation for the best practicable regime.

Plato and the Stoics on law and nature

Both Plato's *Laws* and the political writings of the early Stoics brought "nature" and "law" together in an attempt to ground the latter in the former. Indeed, as we saw in the previous chapter, Marcus argued that Stoic natural law theory was nothing other than an elaboration of a line of thought first suggested by Plato. However, while Plato and the Stoics both sought the authority of nature for law, they differed with respect to the precise relationship between the ideal natural law and laws of actual cities that fall short of this ideal. These differing approaches to the relationship between ideal law and human law, human nature, and convention establish the philosophical terrain that Cicero navigates in Books 2 and 3 of *De legibus*. They also help us better understand the nature of Marcus' project and just why it appears so problematic. Finally, Cicero will find within these earlier treatments of law the inspiration for his own account of the relationship between natural law and the laws of Books 2 and 3. It is therefore important to devote some time now to the accounts of Plato and the Stoics.

In Plato's *Republic*, as is well known, the conventionalist's challenge to Socrates to show that justice is both natural and has intrinsic benefits provides the catalyst for the arguments that follow. Socrates sketches the just city in speech in an attempt to meet this challenge. Perhaps less obvious is the function of the conventionalist's challenge in Plato's *Laws*. Nevertheless, at some key moments in Books 4 and 10 (two of the more philosophically challenging books) the conventionalist's position emerges as a serious threat. In Book 4, the Athenian Stranger announces that

“once again we have come to the dispute over the criteria of the just and unjust.”² He then alludes to a view similar to the position articulated by Thrasymachus in Plato’s *Republic*, namely, that justice is “the advantage of the stronger.”³ According to the Athenian Stranger, those who hold this view suppose that justice is whatever those who have authority to pass laws in the *polis* say it is. Consequently, what is just varies according to regime. The laws establishing justice in a democracy will differ from those establishing justice in a tyranny.⁴

According to the conventionalists, the variability of what is lawful and just among regimes has important implications for the status of justice. These implications are stated explicitly in Book 10:

These people assert first, my good man, that the gods exist by art (τέχνη), not by nature (φύσει) but by certain conventions (νόμοις). They differ from place to place, depending on how the various groups setting down laws (νομοθετούμενοι) agreed among themselves. And they also claim that the good things by nature (φύσει) are different from those by law (νόμῳ), and that the just things are not at all by nature (φύσει), but that people are continuously quarrelling with one another and always changing what is just. And when they happen to change these things, then each of these changes is authoritative (κύρια), though it has been produced by art (τέχνη) and by legal conventions (νόμοις), but certainly not at all by nature (φύσει).⁵

According to these conventionalists, law has come into existence by art instead of by nature. Consequently, law and its accompanying authority to command have no basis in nature. As the Athenian Stranger describes it, this position assumes that nature is prior to, and hence more authoritative than, art and law. As a result, it constitutes a challenge to the lawgiver, for people exist who will readily take the next step and encourage others to follow nature as authoritative rather than the laws of the city.⁶

Kleinias and the Athenian Stranger accept the authority of nature. Hence their answer to the conventionalist’s challenge attempts to demonstrate that law and art are “by nature or something not inferior to nature.”⁷ The basic argument, anticipated by Kleinias at *Laws* 890d, runs as follows: the primary force in nature consists of soul or intelligence (νοῦς); law (νόμος) is the “offspring

² Pl. *Leg.* 4.714b. ³ Pl. *Leg.* 4.714c; cf. Pl. *Resp.* 1.338c.

⁴ Pl. *Leg.* 4.714c–d. ⁵ Pl. *Leg.* 10.889e–890a.

⁶ See Pl. *Leg.* 10.890a. ⁷ See Pl. *Leg.* 10.890d.

of intelligence according to right reason (κατὰ λόγον ὀρθόν).”⁸ Therefore, law and art have a claim to be natural.

It should be noted that the argument establishes only the authority of what the Athenian Stranger refers to as “correct laws” or “right laws” (ὀρθοὶ νόμοι)⁹ set down according to right reason (κατὰ λόγον ὀρθόν). It does not directly establish the authority of non-ideal or human law. The Stranger and Kleinias attempt to connect law to the primary force of cosmic nature, νοῦς, which is divine. The “nature” that serves as the standard for law is divine nature and not human nature, which, we have been led to believe, is different from divine nature. Indeed, the Athenian Stranger had argued earlier that “human nature” (ἀνθρωπεία φύσις) is insufficient for governing human affairs (τὰ ἀνθρώπινα), which should be entrusted to divinity alone. Hence, law is to be based on the distribution of νοῦς, that part of human beings which reflects divine nature.¹⁰ Only those ὀρθοὶ νόμοι that represent the complete expression of νοῦς found in the cosmos are natural.

However, the laws of Magnesia are not equivalent to right law, the perfect expression of νοῦς, even though right law provides the model for the legislation of the second-best city. We find out why in an exchange between Kleinias and the Athenian Stranger in Book 9 at 858a–c. Here lawmaking is compared to a construction project. When builders are in the initial planning stages of the project, they collect building materials with a view towards what is best and as if the materials impose no constraints. To act in such a way is to proceed “more according to nature.”¹¹ However, once the material has been collected and the actual construction process begins, the builders must take into account constraints imposed by the construction materials. As a result, the building that is constructed will not acquire all of the features of its model. The same process holds true for lawmakers. The character and needs of the people for whom the legislation is crafted place constraints on the legislator. Once law and justice are taken from the realm of

⁸ Pl. *Leg.* 10.890d; cf. Pl. *Leg.* 4.714a.

⁹ For the expression “right laws,” see Pl. *Leg.* 4.715b.

¹⁰ See Pl. *Leg.* 4.713c–714a.

¹¹ Pl. *Leg.* 9.858c.

abstraction and applied to human beings, certain modifications, alterations, and elaborations must take place. As a result, the process of setting up legislation based on a model opens up a gap between the resulting legislation and the model upon which it is based due to the intractability of the (human) construction material. Though the laws of Magnesia are not identical to right reason, they are still entitled to obedience inasmuch as they are the closest possible approximation of right law, the ideal expression of νόυς.¹² Consequently, Plato is able to purchase some degree of natural authority for the law code of the *Laws*. Though his argument directly establishes the authority of nature for right law, it also indirectly establishes the authority of the laws of his law code insofar as they imitate right law.

Plato's "indirect" argument for the natural authority of his law code, however, attaches a degree of ambiguity to both the terms φύσις and νόμος. Plato uses νόμος to refer both to the ideal right law and the laws of his city, which are practicable approximations of right law. With respect to φύσις, we have observed that in the Book 10 argument the term picks out divine or cosmic nature. However, the laws of Magnesia are based on human nature, which consists of those characteristics that human beings share in common and which includes irrationality as well as the dictates of divine νόυς.¹³ To the extent to which they do not conform to the dictates of divine nature, Plato's laws are contrary to nature (παρὰ φύσιν). They are in accordance with nature (κατὰ φύσιν) only if we change the meaning of "nature" to "human nature."

Why then does Plato choose to utilize this "indirect" argument if his doing so invites such ambiguity? He most likely does so because he saw this ambiguity as the necessary cost of purchasing the authority of nature for laws adapted to human, rather than divine, nature. When this ambiguity is removed, there results a movement towards the authority of divine law and away from the authority of human law, which is subsequently undermined. Indeed, Plato encourages the reader to move in this direction

¹² See Morrow (1960) 569. Miller (2012) 40 calls this notion a "policy of approximism." See especially *Pl. Leg.* 5.746b–c.

¹³ See *Pl. Leg.* 1.644d–645c.

when the Athenian Stranger announces that God, not man, is the measure of all things.¹⁴ The point will become clearer when we compare the teaching of the Stoics. There we find that these ambiguities are for the most part removed, with the result that the (natural) authority of the laws of the community of gods and sages is affirmed and the (unnatural) authority of the laws of conventional human communities is undermined.

First, the Stoics completely removed the ambiguity surrounding the word “law.” Properly speaking, all law is (to borrow the Athenian Stranger’s terminology) “right law,” that is, the perfect reason of the sage and of god. The ordinary laws of ordinary cities are not proper laws.¹⁵ Cicero’s teacher Antiochus of Ascalon was drawing out the implications of the Stoic position when he argued that “the legislation (*scripta*) of Lycurgus, Solon, and our Twelve Tables are not laws; neither cities nor states exist except for those that consist of sages.”¹⁶ In making this move, the Stoics are developing the implications of a line of reasoning from Plato’s *Laws*, which suggests that the wise legislator has a different intention in laying down his correct laws from the intentions of common legislators in crafting popular legislation.¹⁷ The conclusion drawn by the Stoics is also reached in the pseudo-Platonic *Minos*, where Socrates defends the view that laws which fall short of the criterion for correct laws are not entitled to the name “law.”¹⁸ Thus, the Stoics have cleared up the ambiguity surrounding Plato’s use of law by eliminating positive or customary law.

Second, for the early Stoics the “nature” that the laws should conform to is not particularly human nature as defined by Plato and Aristotle – that is, human nature as a mix of both rational/divine and irrational/bestial qualities and as such distinct from the natures of both beasts and gods – but the rational and divine nature which permeates the cosmos and in which human beings partake completely only insofar as they become sages (*Leg.* 1.18, 19, 23, 25; 2.8, 9, 11; *SVF* 2.528 = LS 67L). Later Stoics may have become more interested in how nature guides those progressing

¹⁴ See *Pl. Leg.* 4.716c. ¹⁵ See *SVF* 3.324.

¹⁶ *Cic. Acad.* 2.136. ¹⁷ See *Pl. Leg.* 5.742d–e.

¹⁸ See Pseudo-Plato, *Minos* 317b–c.

towards virtue, but the earlier Stoa were primarily concerned with how nature guides the sage.¹⁹ They were interested in the man who becomes like the gods by following with perfect consistency the reason that pervades the cosmos.²⁰

There are radical implications for the life guided by such a “participation in reason, which is law by nature (φύσει νόμος).”²¹ Many human customs must be overturned. Thus, Zeno, the founder of the Stoic school of philosophy, proposed that women and children be held in common, private property, coinage, and public buildings be abolished, and men and women dress alike.²² Again, the thread of this argument can be found in Plato. These are very similar to the provisions of the “city inhabited by gods and children of gods,” that is, a city similar to the ideal regime of Plato’s *Republic*.²³ Law according to *divine* nature would stipulate these very provisions. However, law according to *human* nature does not, and in the *Laws* Plato is interested in promulgating and defending this latter type of law. Once again the Stoic position clears up the ambiguity by putting the focus squarely on law according to *divine* nature. The result of this disambiguation is that *human* nature, the properties possessed by human beings alone, is devalued, as are *human* states and laws. As Clement of Alexandria reports:

The Stoics say that the universe (οὐρανός) is in the proper sense a city, but that those here on earth are not – they are called cities, but are not really. For a city or a people is something morally good, an organization or group of men administered by law which exhibits refinement (ἀστέϊον).²⁴

The Stoics both embraced and promoted this devaluation of conventional cities and laws in their celebrated paradoxes. Only the wise are free; they alone are genuinely rulers, holders of public offices, judges, orators, and kings.²⁵

¹⁹ It seems that the Stoa consistently divided natural human development into three stages: the child, the moral progressor, and the sage. The changes introduced by the so-called middle Stoa are most likely changes to which part of the traditional schema received the most emphasis: see Kidd (1971).

²⁰ Godlikeness (ὁμοίωσις θεῶν) is a Stoic ideal (Cic. *Nat. D.* 2.153; M. Aur. *Med.* 10.8; Sen. *Ben.* 4.25) as well as Platonic (Pl. *Leg.* 4.716d; *Th.* 176b).

²¹ See *SVF* 2.528 = LS 67L. ²² See DL 7.33 = LS 67B.

²³ Pl. *Leg.* 5.739c–e. See Vander Waerdt (1994b) 307.

²⁴ Clem. Al. *Strom.* 4.26 (trans. Schofield (1999b) 61).

²⁵ See DL 7.121–2 = LS 67M.

The differences between Plato and the Stoics with respect to the relationship between natural law and the laws of actual cities can be simply articulated as follows: Stoic natural law teaching is used in the service of a much simpler project. Zeno and Chrysippus wanted simply to follow nature and accepted the corrosive consequences that such a life according to nature might have for human laws and customs. However, Plato wished to employ nature as a standard while simultaneously maintaining the validity of human laws. To borrow words originally used to describe a later project, Plato wished “to retain the guiding force of a philosophic grasp of nature as a standard, but to blunt the force of nature as a solvent.”²⁶ As a consequence, Plato never completely excluded non-ideal law from the designation “law.” Although a gap opens up between ideal law suitable for “gods and children of gods” and human laws that take into account constraints imposed by the condition of human subjects, the latter is due the name “law” insofar as it approximates the former.²⁷ For the Stoics such laws that fall short of the ideal by virtue of accommodations to human needs and circumstances are not laws at all. Nature invalidates human customs.

The conventional and the natural

The prologue to Book 2 of Cicero’s *Laws* quickly establishes the relationship between nature and human customs and conventions as a fundamental theme. As they walk along the Fibrenus River on Cicero’s estate in Arpinum, Atticus asks his friend to explain an earlier enigmatic reference to Arpinum as his “genuine fatherland.” Does Marcus mean to suggest that he has two fatherlands (*duas patrias*; *Leg.* 2.5)? Marcus responds in the affirmative. He and all other members of “municipalities,” formerly independent towns that had been granted Roman citizenship, possess two homelands – one by nature (*unam naturae*) and one by the convention of citizenship (*Leg.* 2.5). Given the context, this statement carries special resonance. Marcus had just finished extolling the Stoic

²⁶ Zuckert (1989) 81–2. Zuckert is speaking here of the challenge confronting the Roman jurists.

²⁷ *Pl. Leg.* 9.858a–c.

conception of the universe as a city of gods and human beings at the conclusion of his treatment of natural law (*Leg.* 1.61); the Stoics too recognized the existence of two commonwealths, one by nature and one by convention. This doctrine is most elegantly described by Seneca in *De otio*.

Let us grasp the fact that there are two commonwealths (*res publicae*). The first is great and truly “common” (*publicam*); it includes both gods and human beings ... The second is that into which the circumstances of our birth have enrolled us. This will be either Athens or Carthage or some other city which pertains not to all human beings, but to specific peoples. Some serve at the same time both commonwealths – the greater and the lesser – some only the lesser, some only the greater.²⁸

As Seneca makes clear, there are several possible ways in which individuals may conceive of their relationship to these two commonwealths. They may devote themselves solely to one of the two commonwealths or exercise a dual allegiance. In the case of a dual allegiance, however, which should predominate? On this question Seneca and the Stoics are clear. Our chief allegiance is to the natural fatherland, which always demands our service. As for one’s conventional fatherland, occasions may arise which require the sage to excuse himself from service.²⁹

In his own treatment of the motif of two fatherlands, Marcus inverts the Stoic relationship between the natural and the conventional. He does so in two senses. First, whereas the Stoics held that the natural commonwealth, the city of gods and human beings, was greater than the communities that exist by convention, Marcus designates as natural the smaller of his two associations – the municipality; the fatherland that exists by convention – Rome – contains within itself the smaller natural fatherland. Second, although he holds both dear, on Marcus’ account it is the conventional rather than the natural that should take precedence. It is on behalf of the conventional that “we ought to die and to which we ought to devote ourselves entirely and in which we ought to place and consecrate, as it were, everything” (*Leg.* 2.5).

²⁸ Sen. *De otio* 4.1.

²⁹ Seneca goes on to argue that the wise man will in practice if not in principle abstain from politics since no existing commonwealth is good enough to demand his allegiance (*De otio* 8.1–3). As John Cooper points out, this seems to depart from the teaching of other Stoics and Seneca’s own views found elsewhere: Cooper and Procopé (1995) 170.

From one perspective, the priority that Marcus gives here to the conventional is surprising. After all, his primary task to this point has been to demonstrate that the authoritative standard for such concerns of the city as justice and the other social virtues is found in a philosophical grasp of nature and reason rather than law as conventionally conceived. Yet from another perspective Marcus' devotion to the commonwealth of which he is a member by convention is to be expected. As we saw in [Chapter 5](#), Marcus' methodology in the first book suggested that the philosophical legislator's highest allegiance is in fact to the city and its needs. And the city in question, he has constantly stressed, is no cosmic city, but the best practicable regime exemplified by the Roman Republic, that is, the city of custom and convention. This point is made rather emphatically a little later in Book 2. After listening to his brother's enumeration of the religious laws, Quintus is surprised that these laws do not greatly depart from Roman customs. Marcus responds by pointing out that it is because they are drafting laws for the sort of regime described in *De republica* that he has employed customary laws. Even if he may propose some laws that have never actually existed in Rome, these laws will be adapted to fit a mixed regime and will be more or less in harmony with Roman customs (*Leg.* 2.23).

The beginning of Book 2 suggests that the literary question "How does Book 1 of *De legibus* relate to Books 2 and 3?" is intimately and inseparably connected to a broader philosophical question involving the natural and the conventional. Although nature is authoritative, it must be pressed into service on behalf of the customary. The natural commonwealth of gods and human beings must benefit commonwealths that exist by convention. If nature is the authoritative standard for law, then what is customary must be brought to participate in what is natural. In particular, the authority of natural law must uphold laws drawn from Roman custom, Greek doctrine, and Marcus' own experiences as a Roman statesman.³⁰ Cicero's concerns are closer to Plato's than to Zeno's insofar as he suggests that the natural must support rather than undermine the authority of the customary.

³⁰ For the sources of Marcus' laws, see Rawson (1973) esp. 342–9.

However, the dialogue draws our attention to a problem with Marcus' agenda in Books 2 and 3 almost as soon as it is established. Marcus continues on to restate the Stoic view of law from Book 1. Strictly speaking, laws are not the decrees passed by human assemblies, but "the right reason (*recta ratio*) of supreme Jupiter" (*Leg.* 2.10) and "the reason (*ratio*) and mind of the sage (*sapientis*), suitable for commands and prohibitions" (*Leg.* 2.8). This law is eternal, invariable, and ineradicable (*Leg.* 2.8–14). Human laws that fall short of certain standards for law simply do not count as laws (*Leg.* 2.14). Marcus' restatement of the Stoic definition of law invites the reader to assume that all law is "right reason," an assumption which Quintus in fact makes at *Laws* 2.14. Following Quintus, we are tempted to assume that although Cicero sets out to use nature to preserve conventional legislation like Plato, he is unwilling to risk the ambiguity that Plato invites by referring to both ideal and non-ideal law as "law." Rather, Cicero seems to opt for the consistency of the Stoic position, which requires all law to be ideal, right, and natural law if it is to be entitled to its name.³¹

However, any such marriage of the Platonic concern to uphold the customary with the Stoic insistence that only natural law counts as "law" begets much difficulty. Insofar as the laws of *Laws* 2 and 3 reflect what is customary, they will deviate from nature and fail to conform to the standards of ideal natural law. Brad Inwood aptly describes the result:

Are any of these laws which he [Cicero] gives in those books the sorts of permanent, invariant, unamendable, and irrevocable laws which he claims any law must be, on pain of not being any sort of law at all (*Leg.* 11.13–14), antedating any written or even conventional instantiation in society (11.8, 10–11, 1.19)? No one reading the "laws"

³¹ This view was most elaborately defended by Girardet (1983). Girardet argues that Cicero conceived of the laws of Books 2 and 3 as the substantive contents of the natural law of Book 1. He is followed by Ferrary (1995); E. M. Atkins (2000) 498–502, esp. 500; and Dyck (2004) 103–4, esp. 104 n. 73. Notable dissenters include Griffin (1996) esp. 272–3 and Asmis (2008). Asmis argues that Cicero follows the Stoics in conceiving of written law as a guide which enjoins moral progressors to perform intermediate duties. Her sole evidence that the Stoics held such a view is based on a controversial reading of a single difficult passage, namely, Plutarch, *On the Contradictions of the Stoics* 1037c–d. Even if Asmis is right in suggesting that this passage implies that law guides the actions of progressors, the law under discussion here is the "right reason" of the sage. The passage says nothing about the directive power of conventional written legislation, which the Stoics are on record elsewhere as considering to be wrong and invalid (*SVF* 3.324).

of Cicero will claim that these provisions for the idealized republic of Cicero's historical imagination meet this standard.³²

So long as Cicero requires all law to meet the standards of natural law in every detail, nature will invalidate rather than support his laws, and his goal "to preserve and protect" (*Leg.* 1.20) the best practicable regime must be judged a pronounced failure. But does Cicero in fact endorse such a view? As we will see, he does not.

Natural law and written legislation

In order to understand how *De legibus* handles the relationship between natural law and conventional written legislation, it is necessary to return briefly to Book 1. Marcus, we may remember, adopts his definition of law from the opening of Chrysippus' treatise *On Law*. He defines law as "the highest reason implanted in nature, which commands what should be done and forbids the opposite" (*Leg.* 1.18; cf. 2.8, 10). Marcus maintains that law is the "force that commands right action and forbids wrong action" (*Leg.* 1.19, cf. 2.9). He similarly defines justice, an indispensable component of law as he adduces from the Greek etymology (*νόμος* and *νέμω*), as giving to each his due (*Leg.* 1.19) – a definition which the Stoics shared with the Peripatetics.

Like the arguments found in Plato's *Laws* Book 10 and in the fragments of the early Stoa, Marcus' argument in *Laws* 1 grounds ideal law or "right reason," the unadulterated reason of the sage, in nature (*Leg.* 1.23, 33). What though does he mean by nature? The question requires careful reflection, for in *De legibus* the term "nature" takes on a range of meanings, a fact overlooked by the major English commentaries. It can refer to (1) the characteristic qualities of a given object or subject such as a human being or god (*Leg.* 1.24, 25, 26, 27, 33, 43, 60), (2) that which exists apart from human agreement or artifice, i.e., what is not conventional (*Leg.* 1.28, 31, 33, 35, 36, 40, 41, 42, 43, 45, 47; 2.5, 13, 59, 61), (3) the natural world (*Leg.* 1.2, 2.2), or (4) the cosmos or totality of what exists (*Leg.* 1.18, 21, 23, 61; 2.10, 16; 3.3).

³² Inwood and Miller (2007) 145.

At the outset of his argument for natural law, Marcus explicitly states that the nature he has in mind is *human* nature (*Leg.* 1.17). Since “nature” in this sense seems to indicate the characteristic qualities or properties of a given subject or object (*Leg.* 1.45, 46, 51; 2.8, 29, 67), one might suppose that human nature refers to those properties that are common to human beings. However, as Marcus’ argument proceeds from its starting point in the cosmic community of human beings and gods, it becomes clear that human nature does not pick out all qualities that are common to human beings, but only those that human beings also share with the gods. Properties that may be common to human beings but not common to gods are excluded from a claim to be “natural” in this sense. For instance, Marcus admits that human beings are united as much by the commonality of vice as they are by the commonality of reason (*Leg.* 1.31). Strictly speaking, if commonality (*similitudo*) of qualities constitutes human nature, then irrationality has as much of a claim to be natural as rationality. However, although both are common to the human race,³³ Marcus does not include the vices and irrationality common to human beings along with rationality as properties of (human) nature.

Ultimately human nature in Book 1 is determined not by what human beings share only with one another but by what they share with the gods. For example, Marcus argues: “Furthermore, virtue in human beings and in god is the same; it exists in no other species besides. For virtue is nothing other than nature perfected and brought to completion. Therefore, there is a similarity between human beings and god” (*Leg.* 1.25). And consider once again the first of the two syllogisms that we met in the last chapter.

And therefore, since there is nothing better than reason and it is present in both a human being and a god, there exists a primordial partnership in reason between human beings and the gods. But those who share reason (*ratio*) also share right reason (*recta ratio*); and since this is law, we human beings also ought to be considered partners with the gods in law. Furthermore, among whom there is fellowship in law (*lex*) there also exists fellowship in justice (*ius*). But those for whom these things are in common must be held to belong to the same city. (*Leg.* 1.23)

³³ See Dyck (2004) 149.

Only the qualities that human beings share with the gods are needed to establish the natural basis of law or right reason. Consequently, Marcus' argument ultimately links law, understood as ideal law or right reason, with nature, understood as those qualities that human beings share with the gods.

What, though, does this argument gain for Marcus with respect to his attempt to recruit the authority of nature for the laws of his law code? Commentators have sometimes suggested that the payoff is minimal due to the formality and emptiness of the treatment of law and justice in the first book. Marcus postpones the truly substantive expression of natural law until his discussion of the laws of Books 2 and 3. In the meantime, nothing in the Book 1 discussion provides any guidance for the specifications found in these laws.³⁴ This view is mistaken. Far from being merely formal, empty, and vacuous, Marcus' discussion of natural law in the first book and, especially, his recapitulation of it early in the second book provide important directives for social life.

Let's begin with Marcus' (Stoic) definitions of law and justice. Law is defined as reason, but, as we noted in the last chapter, reason for the Stoics, whose arguments he is following, is substantive, prescriptive, and commands the social good.³⁵ Marcus could find this emphasis on the social prescriptiveness of reason in the same section of Chrysippus' *On Law* from which he had obtained his definition of law: "Law must rule over what is honorable and what is base, as a ruler and a guide, and as a result serve as a standard for just and unjust actions, prescribing for *animals which are political by nature* what ought to be done, and prohibiting them from what ought not to be done."³⁶ For the Stoics, reason, which is identical with law, has normative social and ethical implications, a fact to which Marcus draws our attention by linking it to justice, the social virtue *par excellence*.

While justice as defined by Marcus is formulaic, it is important to note that he commits himself to a particularly Aristotelian/Stoic formula: giving to each his due. Commitment to this definition

³⁴ See Girardet (1983) 56, 60–1 and Inwood and Miller (2007) 145.

³⁵ See Schofield (1999b) 67–74.

³⁶ SVF 3.314 = LS 67R; emphasis added.

of justice resting on the sociability of human beings opens the way for other virtues such as kindness (*comitas*), liberality (*benignitas*), gratitude (*gratus animus*) and mindfulness of generosity (*memor benefici*; *Leg.* 1.32). The same argument is found in *De finibus* 5.66, where these social virtues (along with *pietas*) are explicitly connected with justice defined “as giving to each his due.”³⁷ Later in Book 2 of *De legibus*, Marcus returns to this connection between law and justice to argue that laws should ensure the “health of citizens, security of states, and the tranquility and happiness of humans” (*Leg.* 2.11). Decrees that do not meet these standards are destructive for the state and hardly worthy of the name “law” (*Leg.* 2.11–12). Such passages flatly contradict Klaus Girardet’s pronouncement that “there is not a single passage in *De legibus* in which Cicero portrays the virtues as the content of *ius* (*naturae*).”³⁸ Justice and right reason are not merely understood as an individual’s attitude (*Haltung*) or disposition (*Verhalten*),³⁹ but include important and substantive directives for social and political life.⁴⁰ Law above all forms the character of citizens by regulating their way of life – all with a view towards their happiness.⁴¹

Marcus most clearly expresses this evaluative quality of the ideal natural law near the beginning of Book 2 at 2.11–14. Here he considers the application of these ideal specifications to human legislation in preparation for his own law code. He explains:

Therefore, just as that divine mind is the highest law, so likewise, when it is in a human being, it has been brought to perfection in the mind of the wise man. Those

³⁷ See Chapter 5, pp. 173–4.

³⁸ Girardet (1983) 60.

³⁹ See Girardet (1983) 60. Girardet’s emphasis on the merely dispositional aspect of law or right reason, which makes it immune from codification, shares some affinity with the view of natural law attributed to the early Stoa by Brad Inwood and P. A. Vander Waerdt: see Vander Waerdt (1991); Vander Waerdt (1994a); Vander Waerdt (1994b); and Inwood (1999). For what is to my mind a convincing challenge to this view, see Mitsis (1994).

⁴⁰ Like Girardet, Brad Inwood underemphasizes the capacity of right reason to offer directives for social and political life and hence wrongly characterizes the discussion of law in Book 1 as “vacuous.” Unlike Girardet, Inwood correctly recognizes that the Book 1 discussion directs us to virtuous action: see Inwood and Miller (2007) 145. However, as Julia Annas points out to me (*per litt.*), there is nothing vacuous about laws “which govern practices which enable us to act ... *virtuously*.” She adduces the notion of “virtue rules” as discussed in Rosalind Hursthouse’s *On Virtue Ethics* (Oxford, 1999) as a modern parallel.

⁴¹ See Annas (2013).

laws, however, which have been written down by peoples in various ways and for the needs of the moment, possess the name of "law" by favor more than by fact. For they teach that every law that is indeed able to be rightly called "law" is praiseworthy, employing arguments such as these: it is certainly agreed that laws were invented for the health of citizens, the security of states, and a peaceful and happy life for human beings (*vitamque hominum quietam et beatam*); and that those who first established decrees of this nature showed to their peoples that they intended to write down and put into effect those laws by whose adoption and acceptance they would live honorable and happy lives. Those decrees that were thus composed and established they would of course name "laws." From this it is also to be understood that those who prescribed wicked and unjust commands (*iussa*) for their peoples put into effect anything but laws (*leges*), since they acted contrary to what they had promised and openly professed. As a result, it is evident that in interpreting the very name "law," there is the sense (*vim*) and notion of choosing what is just (*iusti*) and true (*veri*). (*Leg.* 2.11)

Here the general injunctions of right reason for social and political life are applied to *human* life in particular. Law properly aims at what is just, which, when applied to human beings, regulates (a) the health of citizens, (b) the security of states, and (c) the peace and happiness of human life. People expect lawgivers to promulgate laws that lead to "happy and honorable lives", and Marcus suggests that lawgivers consent to an agreement with the people to make such laws. Those leaders who acted contrary to their agreement and "acted contrary to what they had promised and openly professed" cannot be said to have passed laws (*leges*), but wicked and unjust commands (*iussa*). No law which is *perniciosa*, or harmful to human life and happiness, can be just. Therefore, such a law does not meet the original Stoic criterion for law, since inherent to the concept of law is "the sense and notion of choosing what is just and true." Conversely, laws that do promote human life and happiness are just and therefore do indeed meet the criteria for laws.

Not coincidentally, these criteria for law are similar to the purpose of political society that Scipio lays out in Cicero's *Republic*.

Consider now how wisely the rest has been prepared in order to promote that partnership of citizens living happily and honorably (*ad illam civium beate et honeste vivendi societatem*). For this is the first cause of coming together [to form a political society], and it ought to be accomplished by human beings on the authority of the commonwealth in part by institutions and in part by laws (*legibus*). (*Rep.* 4.1 = 4.3)

With this discussion of the application of right reason to human life, we have clearly entered the realm of “law” in the popular sense of the word. While Marcus followed the Stoics in distinguishing between the philosophical definition of law and the way law is used in vernacular discourse, he admitted at the outset of Book 1 that a complete separation is impossible: “But because our entire speech is concerned with popular business, it will be necessary from time to time to speak in popular terms and to designate ‘law’ that which, as common usage has it, prescribes in writing what it wishes either by commanding or forbidding” (*Leg.* 1.19). Like Plato, it turns out that Marcus is willing to invite ambiguity by admitting that both customary human law and right law have a claim to the designation “law.”

The passage at *Laws* 2.11 with its talk of lawgivers who “composed,” “ordained,” and “prescribed” laws – *describo*, translated “prescribed,” literally means to “write out” or “write down” – promotes the application of the natural law to *human* affairs by specifying criteria which *human* laws composed by lawgivers and passed by assemblies must meet. These criteria for human laws are general, and there are presumably many different ways of meeting them. Lawgivers for different peoples will introduce different arrangements depending on the needs of their people. Such legislation is valid so long as it regulates the happiness, security, and virtue of the citizens in accordance with justice. For such law (*lex*) is just (*iusta*) and as such meets the original (Stoic) definition of law which suggests that “the notion of choosing what is just” is inextricably bound with the “very name ‘law’” (*Leg.* 2.11).

Notice, however, that the criteria for human law that Cicero derives from Stoic natural law do not include the permanence, invariability, and irrevocability that characterize divine reason. Ironically, insofar as they derive any criteria for law at all from Marcus’ exposition of natural law in Book 1, commentators have tended to focus on these properties, which Cicero never suggests are to be used as criteria for human laws, to the exclusion of the criteria that Marcus explicitly sets down.⁴² Perhaps readers have been

⁴² See Girardet (1983) 50, 75, 82, 84, 116–18; Zetzel (1999) xxiii; Inwood and Miller (2007) 145–6; and Asmis (2008) 18.

too quick to assume that Cicero does not realize that if permanence, invariability, and irrevocability are introduced as criteria for law, all written laws – Marcus’ included – must be invalidated?

In a brief but important passage, Marcus summarizes the discussion of *Laws* 2.11 and suggests why valid human laws do not necessarily possess all of the attributes of the divine law:

Ergo est lex iustorum iniustorumque distinctio, ad illam antiquissimam et rerum omnium principem expressa naturam, ad quam leges hominum deriguntur, quae supplicio improbos afficiunt, defendunt ac tuentur bonos.

Therefore law is the distinction between just and unjust things, modeled (*expressa*) after that most ancient and chief of all things, nature, at which human laws are directed (*deriguntur*), which punish the wicked by a penalty, but defend and guard the good. (*Leg.* 2.13)

Andrew Dyck rightly notes that *exprimo ad* means to “model on (a pattern).”⁴³ Law, in its capacity to distinguish between justice and injustice, is “modeled after” nature. Nature serves as the original pattern or model for law. However, nature serves as a model or pattern not only for law in the abstract but also for particularly human law (*leges hominum*). The legislation introduced by human lawgivers and ratified by popular assemblies is “directed at” nature and the pure expression of natural law. It is not itself the exact expression of natural law. Thus, this sentence explicitly points out what Marcus’ suggestion, that actual lawgivers could meet the criteria at *Laws* 2.11, only implied: a gap may exist between the pure expression of natural law and human law. Human law need not reflect the natural law in every detail in order to count as law. It is only required to be directed at the appropriate model, that is, nature.

As we have seen, the depiction of lawgiving as arranging human legislation according to a model is Platonic; it is perhaps no accident that the same form of the word translated “modeled” (*expressa*) was also used to describe the relationship between natural law and human law at *De officiis* 3.69,⁴⁴ a passage whose

⁴³ Dyck (2004) 277.

⁴⁴ Cic. *Off.* 3.69: *Sed nos veri iuris germanaeque iustitiae solidam et expressam effigiem nullam tenemus, umbra et imaginibus utimur. Eas ipsas utinam sequeremur! Feruntur enim ex optimis naturae et veritatis exemplis.* “But we possess no secure and distinct model of true law and genuine justice; we make use of shadowy outlines. Would that

Platonic flavor is well documented.⁴⁵ As for Plato, so too for Cicero, the process of copying nature and its perfect law and then applying it to human needs leads to modifications in the law. The natural law, as applied to human beings, will of necessity no longer possess all of its original attributes. In particular, the applied law will no longer possess the universal scope and eternal duration of the original unmodified law.

Cicero reinforces the importance of this point with the exchange between Marcus and Quintus at *Laws* 2.13–14. Upon hearing that human laws are to be modeled on natural law, Quintus claims that he understands the point clearly (*Leg.* 2.13). Marcus then presents him with some test cases regarding the application of natural law as a standard for judging human legislation. What about the agrarian laws sponsored by the tribunes Lucius Appuleius Saturninus, Sextus Titius, and Marcus Livius Drusus? Because these were almost immediately invalidated by the Senate, Marcus denies their legitimacy. Such laws share no part in the permanency of the natural law “whose sense (*vim*) I have explained.” At *Laws* 2.11 Marcus had explained that the sense (*vis*) of law is the notion of choosing what is just and true. Presumably Marcus’ point is that the illegitimate human laws mentioned at *Laws* 2.14 were so short-lived because they were unjust and thus did not meet the criteria for law previously set forth. There is no suggestion here that human laws must share in the absolute permanency ascribed to natural law, that law which “can neither be removed nor abrogated.”

His earlier affirmation notwithstanding, Quintus’ next question suggests that he does not yet grasp the trickiness of applying natural law to the human realm. “Evidently then,” he asks (*Leg.* 2.14), “the laws that you will propose are the sort that are never repealed?” The assumption behind his question is that valid human law must possess all of the attributes of natural law. Quintus has missed the implication of Marcus’ earlier point at *Laws* 2.13, where his brother had argued that law is modeled on nature. So too do many

we follow even these! For they are drawn from the best examples of nature and truth.” The idea that there is a gap between human notions of law and justice and the “best examples” provided by nature is here made even more explicit.

⁴⁵ See Inwood and Miller (2007) 142 n. 16. Inwood notices that Cicero has applied multiple Platonic metaphors (e.g., *umbra*, *imagines*) to Stoic natural law.

modern commentators, who take this question as evidence that Cicero endorses the view that permanence, invariability, and irrevocability are criteria for law in the human realm.⁴⁶

However, Marcus' immediate response suggests otherwise: "Certainly – *so long as they are accepted by the two of you* [Quintus and Atticus]" (*Leg.* 2.14; emphasis added). As we will see, Quintus and Atticus *do not* accept all of the proposed provisions for the code. They never agree to the creation of the office of the tribune (*Leg.* 3.19–26) and the provision for voting by ballot (*Leg.* 3.33–9). Consequently, the condition attached to Marcus' response is never fulfilled. His law code will not be eternal since it fails to receive the necessary support. Through this unfulfilled condition, the dialogue conveys the impossibility of the eternality of any human law code. After all, if Marcus could not persuade his brother and best friend to accept all of his provisions put forward in speech, what actual legislator could possibly succeed when he will invariably face a less friendly assembly and have his laws subjected to more immediate political pressures? Cicero's point is that the criterion of permanency changes when dealing with human laws. Permanence is contingent in the human realm.

The upshot of this discussion is that Cicero does not follow the early Stoics in suggesting that all law must be the exact expression of the right reason of the gods and sages in order to be law at all. He clearly suggests that some written law, promulgated by actual lawgivers, can meet certain criteria derived from the natural law and consequently be recognized as valid. So long as law is directed towards justice while it regulates the health of citizens, the security of states, and the happiness of human life, it is to be recognized as genuine law and to possess the authority of such.

Cicero concludes this important transitional section by providing hints that the forthcoming law code, like the laws of the legislators at *Laws* 2.11, will seek to apply the ideal natural law to human needs. At *Laws* 2.14, and again at 2.24, Marcus identifies his laws with the legislation of these legislators by taking on the role of lawgiver while Quintus and Atticus take on the role of the popular assembly (cf. *Leg.* 3.11). As the product of a human lawgiver

⁴⁶ See e.g., Girardet (1983) 82 and Inwood and Miller (2007) 145.

which is ratified by a human assembly, his legislation does not need to achieve the permanence and generality of the unapplied natural law. His legislation, like that of others who set down written legislation, will be valid if it approximates the natural law as far as possible. Because he is crafting legislation for those who lack the rational consistency of gods and sages, his laws must depart from the eternal, abstract, and immutable principles of natural law. As we turn to Marcus' own laws, we will both see specific examples of these modifications to the natural law and encounter a further statement of the Platonic rationale for these changes.

Religious and constitutional law

Both the religious laws of Book 2 and the constitutional laws of Book 3 show evidence of adaptation from the natural law of Book 1. However, the commentary on the constitutional laws more fully explains why the changes had to be made. Thus, we shall begin our examination of Marcus' law code here.

Marcus introduces the discussion of constitutional law in *De legibus* 3 with an interesting account of *imperium* ("authority" or "command"), law, and nature. He begins by asserting that "nothing is so suited to justice and the natural condition as *imperium* (I want it to be understood that when I speak I am speaking about law)" (*Leg.* 3.3). He goes on to provide examples from the natural world: "For the world also obeys god, and sea and land obey the world, and human life submits to the commands of the supreme law" (*Leg.* 3.3). The next step is to describe the form of human government that most closely reflects this just and natural condition: "And so that I may come to these things closer and more familiar to us – all ancient peoples once obeyed kings. This type of rule was first granted to the most just and wise men (and this was very much the case in our own commonwealth so long as regal power ruled it)" (*Leg.* 3.4).

James Zetzel notes: "The arguments about *imperium* ... are similar to those advanced in favor of monarchy by Scipio at *On the Commonwealth* 1.58–61."⁴⁷ These similarities are not accidental,

⁴⁷ Zetzel (1999) 158 n. 2.

and it is important to recognize this in order to understand Cicero's argument in the present passage. As we discovered in [Chapter 2](#), Scipio's lengthy arguments for monarchy in the *Republic* allowed Cicero to explore the political analogue of the ideal of perfect justice and rational control exhibited by the sun over the other heavenly bodies and god over the earth. Cicero makes it quite clear that the rational control exhibited by monarchs is only an ideal and as such suitable to be put into practice only provided that ideal conditions obtain. Because these conditions do not obtain, Cicero rejected monarchy, along with the ideal regime of Plato's *Republic*, for a form of mixed constitution that was more suitable to human customs and needs.

In the present passage, Marcus is making a similar point. The order of the natural world – and in particular the rule of god over the world – exemplifies a natural condition of justice and reason. Kingship, the regime where “the most just and wise men” rule, is the political analogue to this ideal condition. Here *imperium* is exercised in its most natural and undiluted form. Note that Marcus had explicitly connected *imperium* to law at the beginning of this argument (*Leg.* 3.3). This suggests that kingship also represents the ideal of law understood as right reason. In this metaphorical use of kingship, he follows the precedent of Chrysippus, who, in the very discussion of law from which Marcus borrowed his definition, uses kingship “as a mere metaphor for the directive efficacy of right reason.”⁴⁸

However, Marcus turns from this undiluted form of *imperium* – the efficacy of right reason to govern – to the diluted *imperium* of the mixed constitution in which citizens, in an Aristotelian manner, take turns ruling and being ruled (*Leg.* 3.5). Hence, the constitutional laws are to fit the best practicable regime of *De republica*. Marcus argues: “However, since we are giving laws to free peoples (*liberis populis*), and we have said before what we think about the best commonwealth in our six books [on the topic], we will at this time adapt the laws to that form of constitution (*civitatis statum*) which we commend” (*Leg.* 3.4; cf. 1.20, 2.23). The laws of the best practicable regime do not attain the rational consistency of

⁴⁸ Schofield (1999b) 86.

the right reason of the cosmos or even kingship, the human political analogue. A succession of movements and alterations – from the ideal natural *imperium* of god and the cosmos to the ideal human *imperium* represented in monarchy to the *imperium* of the mixed constitution – has weakened and diluted *imperium* and modified law.⁴⁹

Why are these movements necessary? Marcus explains by turning to the political theory of the “old Stoa.” According to Marcus, the Stoics used to discuss the commonwealth, but their analysis had “nothing to do with popular customs and actual states” (*Leg.* 3.14). Marcus criticizes the writings of the early Stoics on the question of the best regime for the same reasons that Laelius had elsewhere criticized the ideal regime described by Socrates in Plato’s *Republic*: the city of perfectly rational sages leaves no more room for popular customs than the city ruled by philosopher-kings (*Rep.* 2.21).⁵⁰ And yet it is precisely popular customs that Marcus is interested in preserving. Consequently, in order to thwart nature’s corrosive forces, he must dilute her decrees – in this case the principle that magistrates are to exercise just authority (*imperia*) that requires the obedience of citizens (*Leg.* 3.6; cf. 3.3). While nature serves as a paradigm for constitutional law, her injunctions must be adapted to human needs, which in turn leads to the elaboration, specification, dilution, and modification of the initial natural injunction. This process is particularly evident in the discussions concerning the provisions for the office of the tribune (*Leg.* 3.19–26) and the secret ballot (*Leg.* 3.33–9).

After Marcus recites his proposed constitutional laws, Quintus and Atticus examine them to see which they should adopt. The first office to warrant prolonged discussion is the tribunate. Tribunes were officials elected from and by the plebeians, possessed veto

⁴⁹ Lintott (1999) 226 also recognizes that Marcus’ argument here dilutes *imperium* in the mixed constitution. Girardet (1983) 87 n. 9 misconstrues, and so misses the force of, Marcus’ argument when he suggests that the natural form of *imperium*, which is the essence of law, can only be realized in the mixed constitution of *De republica* and *De legibus*. The passage instead suggests that the kind of *imperium* (and law) appropriate to the mixed constitution is a diluted version of the natural form of *imperium* exercised by god over the world and most closely approximated by monarchy.

⁵⁰ See Zetzel (1999) 162 n. 16. Modern scholars have also suggested such a connection between Zeno’s Πολιτεία and Plato’s. For two different attempts to assess the way in which Zeno relied on Plato, see Vander Waerdt (1994b) and Schofield (1999b) 22–56.

power over actions taken by magistrates, and could propose legislation. Should an office of the tribune exist, and if so, what powers should it possess? Quintus takes the hard-line position of the Roman general and statesman Sulla that the office of the tribune is a “great evil” and should not be included among the magistracies in the ideal state (*Leg.* 3.17, 19–22). Marcus responds by admitting that there are some faults inherent in the office of the tribune and that Quintus has accurately identified them. Still, Marcus defends his initial law specifying that their ideal state should retain the office and powers of the tribune. In recommending that the office be abolished, Quintus does “not sufficiently pay attention” to what Julius Caesar’s political rival Pompey the Great understood when he restored the powers that Sulla had stripped from the tribunate: one must pay attention not only to what is best (*optimum*) but also to what is necessary (*necessarium*; *Leg.* 3.26).

Marcus’ decision to retain the office of the tribune against Quintus’ objections shows that the laws of the ideal law code must take into account what is necessary, and if circumstances require, accommodations must be made to these imperfect conditions. For his part, Quintus disagrees with the principle of accommodation; he would choose laws that are the best absolutely (*Leg.* 3.26). This exchange is indebted to a passage in Plato’s *Laws* where the Stranger asks whether one should inquire into what is best (τὸ ἄριστον; τὸ βέλτιστον) or into what is most necessary (τὸ ἀναγκαϊότατον).⁵¹ Kleinias points out that the choice is a false one. Though they are under no constraints now as they gather the raw materials for their laws, they will face the constraints imposed by necessity when they attempt to establish the laws.⁵² Through the choice of Pompey’s position over Sulla’s, Marcus affirms the following important philosophical lesson of Plato’s *Laws*: one must look to both what is best and what is necessary.⁵³ Marcus and Quintus, then, are fundamentally at odds over what kind of ideal the ideal law code should represent. For Quintus, the laws should aspire to what is ideal under ideal conditions, or the best

⁵¹ Pl. *Leg.* 9.857e–858a.

⁵² See Pl. *Leg.* 9.858a–c; cf. 5.742e.

⁵³ Commentators have overlooked Cicero’s debt to Plato for this point.

conceivable ideal. For Marcus, the laws should aspire to the ideal given (present) non-ideal conditions, or the best practicable ideal.

These two approaches also divide Marcus and Quintus later in Book 3 at the second important place in the legal commentary in this book where the rationale for deviation from the unadapted natural law is discussed. Here the issue involves voting. Should the system of oral voting favored by traditionalists be reinstated or should Marcus and his companions opt for the written ballot, which the people considered to be essential “to its own liberty?”⁵⁴ Scholars have long found the details and length of this passage puzzling. As one commentator remarks, “What is odd is the amount of space devoted to what turns out to be, in fact, a pseudodebate with no serious disagreement.”⁵⁵ However, it is easier to understand Cicero’s emphasis on this passage when one recognizes that the dialogue presents the question of balloting as an instance in which care must be taken when applying the general principles of natural law to human legislation.

Nature decrees that the most just and wisest should rule (*Leg.* 3.4). Hence, the procedures whereby officials are selected should ensure the influence of the just and wise. In the debate over balloting, Marcus, Quintus, and Atticus seem to agree that open balloting more successfully secures the influence of such men, presumably because it holds people accountable for their votes.⁵⁶ As a result, Marcus agrees that this view is best. However, he goes on to suggest that they must “consider whether or not ... [oral voting] is practicable” (*Leg.* 3.33). At the conclusion of this part of the discussion, during which Quintus exhorts him to consider only “what is best” (*Leg.* 3.37), Marcus concludes that open balloting is not practical. Unlike the nature of the planets or the earth and sea (*Leg.* 3.3), the desire for freedom is a constitutive element of *human* nature and must be taken into account when applying the principles of natural law to human beings. Hence, although the natural “authority of the good” (*auctoritas bonorum*) is to be

⁵⁴ Cic. *Sest.* 103.

⁵⁵ Dyck (2004) 525. See also Keyes (1921) 322. Scholars have also debated the sources: Nicolet (1970) argues that Cicero is indebted to Plato; Rawson (1973) 349–54 contends that contemporary Roman concerns are more influential.

⁵⁶ See Dyck (2004) 525.

upheld, the people should also receive their ballot as a “guarantor of liberty” (*vindicem libertatis*; *Leg.* 3.39). The general principle that the wise and virtuous should exercise authority still applies to human beings, but when applied to human beings it takes on a particularly human form based on particularly human considerations. In this case, the particular consideration is the human desire for liberty.

Once again Marcus and Quintus cling to their opposing views about whether and how to modify natural law. Quintus insists that the laws of the ideal law code should represent “what is really best (*optimum*)” without any consideration about “what is practicable (*possit*) under the present political circumstances” (*Leg.* 3.37).⁵⁷ Marcus, on the other hand, restates his argument that one must take into account what is possible and practicable (*quid possit*). Politics is the art of the possible. Hence the laws have to be adapted to the subjects of the legislation. Laws governing human subjects must take on different forms than legislation for gods and sages. Like Plato, he suggests that the lawmakers should legislate with a view towards both the ideal natural law and constraints imposed by circumstance.

Turning now from the constitutional law of Book 3 to the commentary on the religious laws of Book 2, we find yet another example of the changes that occur when a principle of natural law is applied specifically to human beings. Right reason mandates piety and the worship of the gods (*Leg.* 1.60; cf. *Cic. Fin.* 5.66). The most immediate and “pure worship” (*puram religionem*; *Leg.* 1.60) takes place in the context of the cosmic city, the city unbounded by walls and in which things “commonly” considered “magnificent” are thought to be worthless (*Leg.* 1.61). In such a context, there is little doubt that temples are included among the common and customary things that are no longer to be regarded; for the sage, they are unnecessary and unnatural.⁵⁸ Despite the fact that right reason precludes worship in temples, Marcus’ proposed law code specifies that the gods are indeed to have temples (*delubra, templa*; *Leg.*

⁵⁷ Trans. Zetzel (1999).

⁵⁸ See DL 7.32–3 = LS 67B; *Plut. St. Rep.* 1034B = *SVF* 1.264 = LS 67C.

2.19, 21). Marcus' prelude to the religious code and subsequent discussion with Quintus and Atticus explain why.

Marcus introduces the laws on religion with a prelude seeking to persuade citizens that the gods exist, govern the world, and keep account of human affairs, punishing the wicked and rewarding the good (*Leg.* 2.15). In [Chapter 5](#), we saw that this prelude was a reworking of key themes in Book 10 of Plato's *Laws*. Here it is important to recognize that, as Jörg Rüpke has recently shown,⁵⁹ this prelude is parallel to the introduction to the constitutional law code of *De legibus* 3 (3.2–5), which we discussed earlier in this section. Just as *Leg.* 3.3 began with the natural *imperium* of the gods who govern the world and then transitioned to the human realm (*hominum vita*), so *Leg.* 2.15 begins by emphasizing the divine administration of the world and concludes by highlighting the human phenomenon of religion: the gods observe “with what piety (*qua pietate*) each human being devotes himself to religious customs (*colat religiones*).” The parallelism extends to the law codes themselves, where both the constitutional and religious laws begin by reiterating a key concept from their respective preludes. The first constitutional law focuses on *imperium*: “Let the authorities (*imperia*) be just (*iusta*)” (*Leg.* 3.6). The first religious law concerns piety: “Let them practice piety (*pietatem*)” (*Leg.* 2.19).

Given the parallelism with the treatment of constitutional law, it is unsurprising to find the same type of adaptation of natural law in the religious code. Marcus' religious laws take as their goal the directive to piety established by right reason; their aim is to direct citizens to piety and the other virtues (*Leg.* 2.27–8). Insofar as they achieve this, they meet the criteria for law that Marcus set out at *Laws* 2.11, namely, law is to provide for healthy citizens, secure states, and the happiness and virtue of the people. However, the city that the laws will benefit is a particularly human city rather than the cosmic city mentioned at the end of *Laws* 1; hence, changes and further specifications will have to be made to adapt the laws to human needs. The view that temples should not be constructed is rejected on the grounds that worship as it is currently practiced by

⁵⁹ See Rüpke (2012) 188–91.

the Greeks and Romans is more “advantageous to states (*utilem civitatibus*)”; that is, it more successfully promotes piety in human beings (*homines*; *Leg.* 2.26). To translate the point into Stoic parlance, worship in temples plays the important social function of instilling a particular virtue – piety – in human beings who are mere progressors in virtue.⁶⁰ Hence, Marcus’ decree, “let them have sanctuaries (*delubra*) in the cities” (*Leg.* 2.19), applies to the human condition the more general directive of right reason to practice piety towards the gods.

The process of applying natural law to the human realm is further illustrated by Marcus’ discussion of augury.⁶¹ As Marcus reminds Quintus and Atticus (*Leg.* 2.31), he himself is a member of the augural college. In a later work, *De divinatione*, Cicero would subject divination to philosophical criticism. Here, however, when Atticus asks whether Marcus sides with those who suggest that the practice of taking auspices arose merely because it was useful to the commonwealth (*ad utilitatem ... rei publicae*) or with those who think divination is actually possible, he immediately chooses the latter (*Leg.* 2.32). Some scholars, noting this apparent discrepancy between *De legibus* and *De divinatione*, have suggested that Cicero ultimately changes his stance on the matter.⁶² It is important, however, to note the differences in the conversations in the two dialogues. The critique of divination in *De divinatione* is part of a private philosophical conversation. Cicero tells Quintus that while he holds that divination must be cultivated “for the sake of commonwealth (*rei publicae causa*),” he is on this occasion prepared to put the practice to the test, since “we are alone and may enquire into the truth of soothsaying without causing ill will.”⁶³ Despite the pounding that divination subsequently appears to receive at the hands of Cicero’s philosophical artillery, he consistently maintains that augury nevertheless is to

⁶⁰ It is important to note that Marcus himself does not use Stoic terminology to describe the function of his laws, *pace* Asmis (2008) 2, 11–19, 28–30. Asmis herself admits that Cicero “barely touches on the Stoics’ unique and elaborate theory of moral progress” according to which she wishes to interpret *De legibus* (11).

⁶¹ The authoritative work on augural law is Linderski (1986). For Cicero on augury, see Linderski (1995), to which this paragraph and the next are much indebted.

⁶² See e.g., Schofield (1986) 47.

⁶³ *Cic. Div.* 2.28.

be preserved for the sake of the republic.⁶⁴ Cicero's reluctance to subject a religious practice he deems useful to political society to a public philosophical undressing brings to mind a remark once made by the Roman polymath Varro. After enumerating several views on the nature of the gods aired by Presocratic philosophers, Cicero's slightly older contemporary added: "There are still other things which our ears are able to bear more easily within the walls of the lecture hall than outside in the forum."⁶⁵

The conversation of *De legibus*, on the other hand, is more suited to the forum than the lecture hall. Though the conversation occurs in private, Marcus, as we have previously noted, is a public man playing a public role before men who are doing likewise. Thus, unlike *De divinatione*, he is in no position to accept the invitation to subject divination to philosophical scrutiny.⁶⁶ However, like Cicero in the later dialogue, Marcus stresses the political importance of augury, which he says "pertains not only to religion but also to the condition of the state" (*Leg.* 2.30). Much like his Book 3 explanation for retaining the office of the tribune, Marcus stresses the primacy of necessity in his promotion of augury: "it is necessary (*necesse*) for me to hold this opinion" (2.31). Yet again Marcus directs us to what he apparently takes to be the central teaching of Plato's *Laws*: the legislator must pay attention to constraints imposed by necessity and contingency.⁶⁷

In his discussion of augury, Marcus offers some insights as to how augury may be useful in responding to necessity; his remarks are further developed in Book 3. First, augurs had the power to stop any action undertaken by a magistrate (*Leg.* 2.31). If an augur observes an adverse or unpropitious sign, the magistrate undertaking an action is obligated to discontinue the action or risk its invalidation by the senate.⁶⁸ Likewise, Marcus indicates

⁶⁴ Cic. *Div.* 2.28, 32, 70, 75.

⁶⁵ Augustine, *De civ. D.* 6.5.

⁶⁶ Thus, Cicero's handling of divination in Book 2 mirrors his handling of natural law in Book 1. In both instances the utmost care is taken to promote the stability of political society. See [Chapter 5](#).

⁶⁷ Pace Turpin (1986) esp. 1,878 and 1,894–5, who holds the opposite view. He reads Marcus' religious law code as an attempt to refute Plato's position in the *Laws* by identifying wisdom and law, thereby giving no weight to necessity or contingency.

⁶⁸ For additional commentary, see Linderski (1986) 2,196.

that augurs have the right to dissolve popular assemblies (*Leg.* 2.31). In Book 3 Marcus points out the political importance of the augur's power to delay business in the senate and – especially – the popular assemblies. Augurs may use delays to give time for the people's passions to cool, thus averting the passage of *prima facie* appealing, but ultimately unjust, legislation (3.27). Marcus also emphasizes the importance of augury for addressing moments of crisis for the commonwealth (*rei publicae tempus*; *Leg.* 2.33). Once again he elaborates on the point in Book 3. When the commonwealth is facing its greatest crises (*maximis rei publicae temporibus*), the augur should offer his services to the *res publica* by using his powers to thwart wrong action (*Leg.* 3.43).⁶⁹ Thus, Marcus' treatment of the powers of augurs shows that the legislation of the best practicable regime must deal with passions, contingency, and necessity.

Cicero, then, utilizes the commentary on both the religious and constitutional laws to reveal how the laws that Marcus proposes relate to the directives of natural law. The religious laws of Book 2 represent adaptations of the injunction to act piously towards the gods; the constitutional laws of Book 3 apply the virtue of justice to human beings. In each instance, the aim is to apply the injunctions of natural law to human life, though the very act of applying the natural law leads to modifications to the original principles. After all, the skillful legislator knows he must accommodate political necessity.

Platonic paradigmaticism and the tripartite division of law

On account of his choice to adapt the natural law to human needs, Marcus' law code has become more detailed in its provisions and narrower in its scope than its model. It is narrower because it is suited to human beings alone, whereas the unaltered provisions of right reason guide the natural world, cosmos, gods, and sages. It is more detailed because the general principles of natural law must be applied to specific human situations.

⁶⁹ See Dyck (2004) 543.

However, although more detailed in its provisions and narrower in its scope than the natural law on which it is modeled, Marcus' law code is still quite general and broad. Generally speaking, the relevant circumstances which require the law to be adapted are common to the entire human race rather than one particular nation. For example, the laws applying nature's injunction to piety to human beings call for the honorable burial of the dead and the protection of sacred places (*Leg.* 2.22). These are principles shared generally by humankind and not limited to a single nation. The magistracies in Book 3 are adapted to a mixed constitution similar to the ancestral constitution of Rome, it is true, but Cicero had already made it clear in *De republica* that this mixed constitution was the best exemplification of the best practical political order. In *De legibus* he emphasizes that as such it provides a suitable model for all nations, provided they are free (*Leg.* 2.35, 3.4). However, occasionally the discussion seems to shift its focus to the Roman people in particular, as in e.g., the Book 2 account of the private rites for Romans (*Leg.* 2.46–68). What accounts for this still more specific application of law?

My discussion thus far has focused solely on the relationship between natural law and the laws that Marcus sketches for his best practicable regime. This emphasis is certainly appropriate: Marcus and his interlocutors focus most of their attention on these types of laws, and the very structure of the dialogue naturally raises the question of their relationship. However, it should be noted that Marcus identifies and discusses not two but three types of law in *De legibus*. And in fact, he explicitly announces this tripartite division of law at the outset of their discussion:

Natura enim iuris explicanda nobis est, eaque ab hominis repetenda natura; considerandae leges quibus civitates regi debeant; tum haec tractanda, quae composita sunt et descripta, iura et iussa populorum; in quibus ne nostri quidem populi latebunt quae vocantur iura civilia.

For we must (1) set out the nature of law, and that must be ascertained from the nature of man; we must (2) consider the laws by which cities ought to be governed; and then we must (3) treat those things that have been composed and written down – the laws and decrees of peoples – among which not even the laws of our people, which are called “civil laws,” will escape our attention. (*Leg.* 1.17)

(1) clearly refers to the Book 1 discussion of natural law, which derives the nature of law, the imperatival force of reason which

commands justice and other social virtues, from human nature. Given that civil law, the subject of (3), “will be confined to a small and narrow space” (*Leg.* 1.17), (2) must refer to the second major theme of *De legibus*, Marcus’ law code for the best practicable regime. (3), the civil law of peoples, then refers to the occasional treatment in *De legibus* of law specific to individual nations. The account of the Roman religious rites beginning at *Laws* 2.46, which was initiated by Atticus’ request for a discussion of laws that “pertain to the *ius civile*,” falls into this category. In Book 3 Atticus likewise asks Marcus to discuss “the law of the Roman people, as you planned to do” (*Leg.* 3.48). However, this discussion has not survived.

This three-fold division of law calls to mind Cicero’s tripartite division of law in *De officiis*.

Itaque maiores aliud *ius gentium*, aliud *ius civile* esse voluerunt; quod civile, non idem continuo *gentium*, quod autem *gentium*, idem civile esse debet. Sed nos veri iuris germanaeque iustitiae solidam et expressam effigiem nullam tenemus, umbra et imaginibus utimur. Eas ipsas utinam sequeremur! Feruntur enim ex optimis naturae et veritatis exemplis.

For this reason our ancestors understood the *ius gentium* to be one thing and the *ius civile* another. What belongs to the *ius civile* need not also be a part of the *ius gentium*. However, what belongs to the *ius gentium* must be a part of the *ius civile*. But we possess no secure and distinct model of true law and genuine justice; we make do with shadowy outlines. Would that we follow even these! For they are drawn from the best examples of nature and truth.⁷⁰

The three types of law in view in this passage are the *ius gentium* (“law of nations”), the *ius civile* (“civil law”), and the natural law, which provides “the best examples of nature and truth.” How do these types of law relate to one another? What is their relation to the tripartite division of law in *De legibus*? It is striking that both the classifications of law in *De officiis* and *De legibus* have two categories in common, the natural law and the civil law. Given this, it is tempting to conclude that the *ius gentium* is equivalent to the laws of Marcus’ code in *De legibus*. In this case both the *ius gentium* of *De officiis* and the laws of Marcus’ code would share the same relationship to the *ius naturale* and the *ius civile*.⁷¹ This

⁷⁰ Cic. *Off.* 3.69.

⁷¹ For this suggestion, see Griffin (1996) 272–3.

suggestion is not quite right, and the difference is instructive for understanding the classification of law in *De legibus*. As we shall see, while Marcus' law code and the *ius gentium* relate differently to the *ius naturale*, they relate similarly to the *ius civile*.

As I have argued, Marcus' law code is not a direct expression of natural law, but rather is the closest approximation to natural law once this law has been modified and adapted to suit human necessities. From *De officiis* 3.69 one might suppose that such a relationship obtains between the shadowy *ius gentium* and nature, the source of the "best examples of nature and truth." However, earlier at *De officiis* 3.23, Cicero had identified the *ius gentium* with what is "by nature," which suggests that it is equivalent to natural law. Here we really have two types of law: the law that is "by nature, i.e., by the *ius gentium*," as well as the laws of particular communities (*leges populorum*).⁷² Cicero also identified the natural law and the *ius gentium* in a speech delivered before the Senate in 56 BC in which the "law of nature (*lege naturae*)" is glossed as "the common law of nations (*communi iure gentium*)."⁷³ Cicero, then, seems consistently to identify the *ius gentium* with the *ius naturale*. Natural law, according to Cicero, provides a "rational standard for all legal systems and *ius gentium* [is] ... an indication of its universal acceptance."⁷⁴ So while Marcus' law code in *De legibus* allows departures from the natural law, the *ius gentium* appears to be identical with the natural law.⁷⁵

⁷² Cic. *Off.* 3.23: *Neque vero hoc solum natura, id est iure gentium, sed etiam legibus populorum, quibus in singulis civitatibus res publica continetur, eodem modo constitutum est, ut non liceat sui commodi causa nocere alteri.* "In the same way this principle has been established not only by nature, that is, by the law of nations, but also by the laws of peoples, by which political society is held together in individual states: one may not harm another for the sake of his own advantage."

⁷³ Cic. *Har. resp.* 32: *Vetera fortasse loquimur; quamquam hoc si minus civili iure perscriptum est, lege tamen naturae, communi iure gentium sanctum est ut nihil mortales a dis immortalibus usu capere possint.* "Perhaps we are telling old stories. Still, if this principle has not been prescribed by civil law, nevertheless it has been ordained by the law of nature, the common law of nations: mortals are able to claim by the right of acquisition nothing from the immortal gods."

⁷⁴ Sigmund (1971) 25.

⁷⁵ We must be cautious when we speak about Cicero's view of the *ius gentium* since he appears to have been the first to use the word in a technical sense. In particular, we must be aware that Cicero may not have always used the term with the same philosophical precision. For a study of the term's origins, see J. Michel (1956).

However, if Marcus' law code and the *ius gentium* differ in terms of their respective relationships to natural law, they seem to relate similarly to the *ius civile*. *De officiis* 3.69 clearly explains the relationship between the *ius gentium* and the *ius civile*. The *ius civile* results when local circumstances, needs, and necessities lead lawmakers of individual nations to modify the arrangements that all nations share in common. As a result, "the laws of individual nations are more specific and detailed and more related to local conditions."⁷⁶

This is precisely the relationship that obtains in *De legibus* between the laws of Marcus' law code and the *ius civile*. Consider the religious laws of Book 2. The natural law mandates piety towards the gods, and Marcus' law code, as we have seen, applies this natural law to human beings and, in the process of application, modifies it. The same holds true for the relationship between civil law and Marcus' code. For example, Marcus' code decrees: "Let private rites be maintained in perpetuity" (*Leg.* 2.22).⁷⁷ In his introduction to the discussion of private rites, Marcus points out that the "innumerable" regulations and decrees that make up the Roman civil law are applications derived from "this one rule (*hoc uno posito*)" (*Leg.* 2.48).

The *ius civile*, then, relates to the laws of Marcus' law code in much the same way as the latter relates to the natural law. As the particularly human needs and circumstances lead to the elaboration and application of, and sometimes departures from, the law of nature, so the particular needs and circumstances of the Roman people lead to the elaboration, application, and modification of Marcus' code. The first set of accommodations results in the rather general laws for the best practicable regime provided in Marcus' code, while the second results in the *ius civile* or *iura et iussa populorum* – the laws adapted for particular nations. Consequently, a symmetrical relationship obtains between the three types of law in *De legibus* which does not hold for *ius civile*, *ius gentium*, and *ius naturale* in *De officiis*.

⁷⁶ Griffin (1996) 273.

⁷⁷ Even if we take *perpetua* ("in perpetuity") to indicate permanence, this is not evidence that Cicero intends for his law code to endure eternally. This law occurs *after* the discussion between Marcus and Quintus had already indicated that permanence is contingent in the human realm (*Cic. Leg.* 2.11–14).

Cicero's division of law is a direct result of his application of Platonic "paradigmatism" to legal thought. The laws of Marcus' law code, as the general principles for human laws (*leges quibus civitates regi debeant*), are valid insofar as they approximate and embody as far as possible the directives of the natural law on which they are modeled. The laws of individual nations, likewise, are valid insofar as they approximate and embody as far as possible the dictates of the more general human laws. Yet unlike Plato's treatment of the matter, the paradigmatic relation on Cicero's account obtains between three rather than two types of law.

Cicero's innovation has philosophical implications. Plato and Cicero both employ paradigmaticism to support a particular claim: human laws that approximate nature may still enjoy a degree of nature's authority. Now the validity of this claim is not immediately evident. After all, while the modified law may be regarded as being in agreement with nature (κατὰ φύσιν) insofar as it imitates nature, it may also be deemed to be contrary to nature (παρὰ φύσιν) to the extent that its modifications constitute departures from nature's norms. Why should a law's derivation from natural law secure for it nature's authority if it now at best only approximates the undiluted law of nature? Why not accept the Stoic argument that any such deviation from natural law renders laws invalid?

It is the symmetrical nature of the relationship between the various types of law in Marcus' account that lends added plausibility to his claim of nature's authority for human laws in the face of such objections. It does so in two ways. First, it makes plausible the basic assumption of paradigmatic accounts, namely, that the closest possible approximation of a certain model counts as the realization of that model.⁷⁸ While the Stoic objection to the adaptation of the natural to fit the human and customary *prima facie* carries some force, the corresponding specification of human law seems to be more secure. It intuitively seems to make sense that laws of individual peoples and political societies may in fact claim to be valid insofar as they are adaptations and applications of more general principles in accordance with particular circumstances.

⁷⁸ See Pl. *Resp.* 5.473a–b.

For instance, it is hard to see how one may object to legislating courts and punishments peculiar to individual peoples as a specification of the general human principle that criminals should be punished, to take an example from a topic that Marcus promises to discuss in a subsequent book, which either no longer survives or was never written (*Leg.* 3.47).⁷⁹ But if one intuitively recognizes the authority of specific applications of the human law, why not also accept these general human laws as authoritative inasmuch as they are particular applications of the still more general natural law? If paradigmatism purchases a measure of authority for one type of law, why shouldn't it also purchase authority for the other?

Second, the intermediate status of Marcus' laws serves as a buffer to soften the transition between natural law and the very particular *ius civile*. For example, Marcus suggests that such provisions from the Roman Twelve Tables as the prohibition against building a funeral pyre within sixty feet of another's home against the wishes of the owner are "in accordance with nature, which is the standard for law" (*Leg.* 2.61). Yet Marcus does not include these particular details in his initial code, but rather the more general "Let them limit expense and grief for them [the dead]" (*Leg.* 2.22). It is not hard to see why. Had Marcus begun by presenting the prohibition in the Twelve Tables as an unmediated adaption of natural law, his claim would have appeared rather implausible. How could such a specific and particularly Roman provision have a claim to be natural? However, such a scenario is far easier to imagine if, as Marcus has led us to believe, this claim rests on the fact that the particular prohibition is a specification of a more general human provision that is itself derived from a yet more general natural principle. Consequently, the tripartite division of law along with the symmetrical relationship that obtains between the types of law aids Cicero in his attempt to utilize nature as a standard for his laws while mollifying nature's capacity to act as a solvent of human law and customs.

⁷⁹ For this example, see also Thomas Aquinas, *Summa Theologiae* 1-II, Q. 95, A. 2. One should note, however, that for Cicero, operating in a Platonic mode, specifications or instances of a paradigmatic model or principle entail a falling short of the paradigm. This is not necessarily the case for Aquinas.

The legacy of the *Laws*

The history of modern no less than classical thought has often revealed the concept of nature to be the ally of the revolutionary and foe of the legislator. Safer for the latter to forgo discussion of nature altogether and adopt the strategy of the Federalists who, following the ratification of the US Constitution, “argued that once a legitimate government had been instituted, it was best to be reticent about making direct political appeals to nature, for fear that they could destabilize government.”⁸⁰ More difficult by far is to work out how the natural and the customary can both have authority in any meaningful sense, as Cicero does in the *Laws*. Yet it is a risk worth taking. By appropriating nature as a standard for his laws, Marcus is able to defang and domesticate their greatest threat and employ it as an ally.

The relationship between natural law and positive law – between nature and custom – would of course continue to vex subsequent treatments of law. At least some of the Roman jurists of the Empire followed Cicero in dividing law (*ius*) into three parts: *ius naturale*, *ius gentium*, and *ius civile*.⁸¹ The most general and universal of the three is the *ius naturale*, which signifies “what is always fair and good,” that is, it specifies what is fair and good abstracted from any specific considerations or constraints, such as what is fair and good for, e.g., human beings or Athenians. The *ius gentium* represents what is “common for all human beings” and reflects “what natural reason (*naturalis ratio*) has set up among all human beings.”⁸² As to whether it is identical to natural law, our sources reveal some disagreement: Gaius (c. AD 130–80) seems to identify the *ius gentium* and *ius naturale*, while Justinian’s *Institutes* (AD 533) seems to indicate a divergence.⁸³ The latter notes:

⁸⁰ Ceaser (2006) 29.

⁸¹ See Just. *Inst.* 1.2.pr.-2; Ulpian *ap. Dig.* 1.1.6. Gaius apparently opted for a dichotomy of *ius gentium* and *ius civile* (Gaius, *Inst.* 1.1; cf. *Dig.* 1.1.9). For the suggestion that Cicero is the source for the jurists’ tripartite classification of law, see most recently Ando (2006) and Ando (2008) esp. 79–81.

⁸² Just. *Inst.* 1.2.1.

⁸³ See Sigmund (1971) 25; Zuckert (1989) 75–82; and Inwood and Miller (2007) 138–39.

However, the law of nations (*ius gentium*) is common to the entire human race. For under the compulsion of circumstance and human necessities, the human race has established certain measures for itself. For wars have arisen and captivities and servitudes have followed, which are contrary to the natural law (for by natural law at the outset all men were born free).⁸⁴

Finally, the *ius civile* is concerned with “what is advantageous for all or most in each city.”⁸⁵ The particular legislation of individual cities (including laws regarding “buying, selling, leases, hire, partnership (*societas*), deposit, lending, and countless others”) derives its ultimate authority from the *ius gentium*.⁸⁶

Despite this three-fold structure, it is doubtful that the jurists followed Cicero in holding the natural law as the highest and most authoritative. Consider a practice such as slavery, recognized as common to the human race as part of the *ius gentium* and incorporated into the laws of particular nations as part of the *ius civile*. When laws regarding slavery conflict with the natural law, it is the *ius civile* that takes precedence. For the jurists, the highest, that is, the most authoritative, law is the *ius civile* and the lowest is the *ius naturale*.⁸⁷ Nature and reason lose their potency as critical standards.

In the *Decretum* of Gratian (c. AD 1140) nature’s authority is restored. “But natural law without qualification prevails in status over custom and decrees. So whatever provisions have been either established in custom or provided for in written legislation are to be held null and void if they are contrary to natural law.”⁸⁸ Yet, despite recognizing nature’s force as a standard for legitimate customary laws, Gratian is unable to establish how and under what conditions customary practices may be preserved. Thus, while he recognizes that natural law invalidates personal property, the validity of customary laws establishing individual property is nevertheless assumed throughout his argument.⁸⁹ Gratian ignores the difficulties involved with maintaining both the authority of the natural and the customary.

⁸⁴ Just. *Inst.* 1.2.2. See also *Dig.* 1.1.1.

⁸⁵ Paul *ap. Dig.* 1.1.11; cf. Ulpian *ap. Dig.* 1.1.6

⁸⁶ Just. *Inst.* 1.2.2.

⁸⁷ See Zuckert (1989) 82 and Johnston (2000) 621.

⁸⁸ Gratian, *Decretum* 8.2.

⁸⁹ See Tierney (1997) 60.

The treatments of natural law and custom by the Roman jurists and Gratian throw into sharp relief what Cicero achieved in the *Laws*. Though often relegated to the sidelines in contemporary discussions of natural law,⁹⁰ in this dialogue Cicero has bequeathed to us the most impressive and comprehensive treatment of the relationship between nature and custom prior to Thomas Aquinas (c. AD 1225–74). In doing so, Cicero raises the possibility that ideal conceptions of nature and reason may yet be brought to bear on political affairs in a constructive and not merely destructive way, an optimistic – and perhaps fitting – conclusion to his investigation of politics and the limits of reason.

⁹⁰ So for example the essay devoted to Cicero in one important collection of essays on natural law theory focuses on *De officiis* rather than *De legibus*: Arkes (1992) in George (1992).

CONCLUSION

Surveying the intellectual landscape of the mid-eighteenth century, David Hume reports: “The fame of CICERO flourishes at present; but that of ARISTOTLE is utterly decayed.” Hume presents Cicero as his leading example of those philosophers whose “reputation is the most durable.” Such cautious philosophers shy away from radical conclusions and restrict themselves to presenting “the common sense of mankind in more beautiful and more engaging colors.” The result: present acclaim and much promise for remaining highly regarded by posterity.¹

A prophet Hume was not. Cicero’s reputation as a philosopher suffered greatly during the nineteenth century and has never fully recovered. Consider Moses Finley’s assessment of Cicero’s *Republic*:

Like Mommsen, I find the central idea of the *Republic* “as unphilosophical as unhistorical” ... Of metanormative analysis there is none; there is only rhetoric, in which I include the Stoic notions of “natural law” and “natural reason” that have loomed so large in western writing from the Church Fathers to our own day. Whatever genuinely philosophical meaning those terms may have had for the Stoics themselves, Cicero turned them into mere rhetoric; terms of “approval for whatever idea [one] wanted to recommend at any particular time,” in his case the Roman constitution of the good old days.²

I hope by now that such assessments carry little conviction. The *Republic* and *Laws* are carefully constructed works of political philosophy by an author in command of resources both Greek and Roman. Cicero does not use the political philosophies of Plato, Polybius, and the Stoics as part of a rhetorical ploy in support of his own narrowly political agenda. Rather, he engages carefully and critically with their thought as he explores a difficult

¹ Hume, *An Enquiry Concerning Human Understanding*, 6.

² Finley (1983) 128.

and complex philosophical question. His further exploitation of Roman political and legal concepts helps prepare the groundwork for important, and even original, contributions to political philosophy.

Cicero's *Republic* and *Laws* find their place among those works of political philosophy written just as the political and intellectual landscape that nourished their production was irrevocably changing. Within a year or two of their composition, Caesar would cross the Rubicon with his army. Republican government at Rome had come to an end; and with it, any realistic hope of restoring the constitutional and legal arrangements that Cicero had recently analyzed. However, at a more fundamental level, Cicero's focus is not the constitutional arrangements per se but the important concepts illuminated through their analysis: reason, nature, human nature, chance, history, and custom. Cicero explores philosophical principles instead of recommending political policies for implementation. His *Republic* and *Laws* do not simply mark "the emergence of political rationality" by codifying the Roman aristocratic tradition in light of the universal criteria of reason and nature;³ they also, and more fundamentally, probe deeply into the limits of reason in political affairs as well as the circumstances under which reason's rule might be implemented.

Cicero's focus on first principles and foundational concepts enables his *Republic* and *Laws* to retain their relevance long after the end of republican Rome. The basic line of enquiry that unfolds in these dialogues directly or indirectly bears on questions shared by later political theorists. Even though the focus of this book has been on explicating Cicero's central argument, thinkers such as Gratian, Machiavelli, John Locke, Thomas Jefferson, John Adams, Benjamin Constant, Hannah Arendt, Michael Oakshott, and Stanley Hauerwas have made brief appearances as we have worked our way through these dialogues. Having reached the conclusion of the *Laws* – and Cicero's answer to the problem raised in the *Republic* – one might wonder where the larger argument stands in relation to later political thought and whether any of it

³ So Moatti (1988).

has relevance for present points of debate in contemporary political philosophy. In conclusion, I will briefly address these questions.

A complete answer to such questions, of course, could fill another book. Here I shall limit my discussion of the relevance of Cicero's treatment of reason and its limits to two even more specific questions. The first concerns the increasingly prominent debate among contemporary political philosophers about the proper way to frame enquiry into politics. Some political theorists have argued that we should aim for just ideals and concern ourselves with the search for perfectly just and rational institutions; others have countered that this search for "perfectly just social arrangements is incurably problematic" and such utopianism should be abandoned in favor of the investigation of actual – or at least feasible – political behavior and institutions.⁴ The former are commonly known as "ideal theorists" and the latter, "realists." While the current debate is often associated with the defenders and critics of the philosopher John Rawls, one of its recent participants, Amartya Sen, draws battle lines with a much longer historical scope: ideal theorists can count among their number Hobbes, Rousseau, Kant, Rawls, Dworkin, Gauthier, and Nozick; realists include Smith, Condorcet, Bentham, Wollstonecraft, Marx, and Mill.⁵ As we have seen, Cicero's *Republic* and *Laws* explore the relationship between ideals and actual and realizable regimes at great length. What do these dialogues have to contribute to the contemporary debate over ideal theory?

As the widely varied positions endorsed by the thinkers claimed for the respective ranks of realists or ideal theorists should suggest, the debate over ideal theory concerns in the first instance methodology rather than substantive positions. Thus, my second concern in this conclusion has to do with Cicero's contribution to substantive questions of political philosophy. His investigation brings to the fore the concepts of history, tradition, and nature in a way that brings to mind the modern strand of conservatism that traces its lineage to Edmund Burke, a man who knew his Cicero well. Indeed, Woodrow Wilson once noted that through his study of Cicero,

⁴ Sen (2009) 11. See also Geuss (2008).

⁵ See Sen (2009) 5–8.

Burke “met a man after his own heart ... Cicero he conned as his master and model.”⁶ Another prominent conservative philosopher concerned with reason and politics, Michael Oakeshott, we have already enlisted on more than one occasion for help in explicating the argument of the *Republic*. How, then, does the basic argument developed by Cicero, widely regarded as the ancient world’s most eloquent conservative, compare with this modern conservatism?

In what follows, I argue that Cicero anticipates important elements of the thought of both Burke and Oakeshott. Like the latter, Cicero’s skepticism informs his approach to history; like the former, Cicero sees the need to supplement his discussion of history with an account of nature. As we review Cicero’s engagement with these substantive issues, we will see that *De republica* and *De legibus* exhibit a nuanced stance towards ideal theory that defends utopianism as a vital component of political philosophy while cautioning against utopia’s implementation. Thus, Cicero provides a perspective on utopia that is frequently absent from the current philosophical debate. My intention is to use this discussion to review and highlight more distinctively the arguments of Cicero’s *Republic* and *Laws*. This goal, therefore, will further limit my remarks.

Both Burke and Oakeshott were concerned with identifying limits or constraints on rational rule. Several of their central views were recently developed at length in *The Uses of Pessimism* by Roger Scruton.⁷ Scruton argues for the importance of recognizing the “limits and constraints” of human nature and customs on our hopes and aspirations for a good society. Human beings are “hard-wired” to be attracted to “rational” systematic plans to overcome problems presented by circumstance. Therefore, we need a healthy “dose of pessimism.” We need the accommodation, not mastery, of human nature; tradition, not rational planning; realizable regimes, not utopias.

Much of my description of Scruton’s basic position should sound familiar. The central thread running through Cicero’s

⁶ Wilson (1896) 113–14.

⁷ Scruton (2010). For the quotations in this paragraph, see respectively pp. 16, 3, 210, and *passim*.

Republic and *Laws* is the need for rational rule to take into account the constraints imposed by human nature and contingency. Both dialogues have constantly probed the limits of the sort of ideal rule prescribed by reason. While Cicero agrees with Plato and the early Stoics that reason makes substantive claims on us, he also follows their lead in stressing the incapacity of human beings to implement such rule. Like Plato's *Laws*, he draws the following conclusion: what is best must yield to what is practicable. Given human nature, the implementation of utopia is not only impossible, but also dangerous.

However, there are several road-maps to utopia. Utopia may take the form of a picture in heaven, which holds out a vision of the harmony to be achieved by the perfection of human nature. But utopian thought does not necessarily have to begin by rejecting human nature and institutions as they are; "it could [also] be articulated as a projection of existing developments and potentialities into a new dominant general pattern," as Malcolm Schofield points out.⁸ Of this Oakeshott was well aware. Thus, he finds within the modern strain of rationalism that purports to begin with man as he is a "politics of perfection" that has no room for "a best in the circumstances."⁹ As we have seen, Cicero raises the possibility of such a path to utopia through his critique of Polybius, who begins by rejecting Plato's utopianism and rationalism only to substitute a different type of rationalism that reflects a different type of utopian thought. By starting from human nature as it is (or at least as he sees it), Polybius would rationally engineer a constitutional order that ultimately has no more room for chance than Plato's Kallipolis. At least the latter (on Cicero's reading) draws our attention to, rather than obscures and eliminates, the presence of contingency. It seems that contingency is the one thing that utopian thought of any stripe cannot tolerate.

If the political society of our dreams cannot be engineered through "the rational pursuit of an overarching plan,"¹⁰ where should we turn to find solutions for political problems? "Tradition," answer Burke, Oakeshott, and Scruton. Of what does tradition consist? Let us begin with Burke. In his *Speech on Representation*

⁸ Schofield (2006) 200. ⁹ Oakeshott (1962) 5. ¹⁰ Scruton (2010) 125.

of the Commons, Burke describes how the British people “chose” their constitution:

This is a choice not of one day, or one set of people, not a tumultuary and giddy choice; it is a deliberate election of ages and of generations; it is a constitution made by what is ten thousand times better than choice, it is made by the peculiar circumstances, occasions, tempers, dispositions, and moral, civil, and social habitudes of the people, which disclose themselves only in a long space of time. It is a vestment which accommodates itself to the body. Nor is prescription of government formed upon blind, unmeaning prejudices – for man is a most unwise and a most wise being. The individual is foolish; the multitude, for the moment, is foolish, when they act without deliberation; but the species is wise, and when time is given to it, as a species it always acts right.¹¹

Burke’s account calls to mind a passage from Book 2 of Cicero’s *Republic* in which Scipio reports the elder Cato’s explanation for the rise of the constitution of the Roman Republic. It came about not by the intellectual talent (*ingenium*) or planning of one individual but by the choices of many individuals made over time (*Rep.* 2.2). Does Cicero precede Burke in affirming the rationality or wisdom of tradition? The *Republic* and *Laws* entertain a nuanced response to this question. As we have seen, these dialogues constantly challenge us to consider the gap between reason and tradition/customs. The rational and the actual will never be identical. Political history, like psychology and cosmology, speaks to reason’s limits. Burke’s claim that the human species “always acts right” given time must be, on Cicero’s view, an overstatement. It is true that Cicero’s presentation of Rome as the best exemplification of the best practicable regime – the regime whose order and laws most approximate the rule of reason – suggests that its traditions do reflect rationality to a substantial degree. However, these dialogues frequently undercut the view that tradition is moved along by rationality to some predisposed end by drawing our attention to the presence of flux, chance, necessity, and irrationality. On the question of the rationality of tradition, Cicero is perhaps closer to Oakeshott, who emphatically denies that tradition exhibits a discernible rationality.¹²

¹¹ Quotation from Stanlis (1958) 167.

¹² For the comparison of Oakeshott and Burke on the rationality of tradition, see Franco (1990) 139–40.

Oakeshott's own traditionalism has sometimes been criticized for lacking the resources to provide a critical perspective on itself. Can tyrannies as well as legitimate regimes not find support in tradition? Can tradition really provide a critical perspective on current regimes? Whereas Oakeshott nowhere explicitly addresses these questions,¹³ Cicero shows how accounts that rely on tradition as the repository of political knowledge and guidance might go about answering them. The development of traditions can be traced *historically*; and history reveals the rights and freedoms that have traditionally defined what it means to be a citizen in a given political society. *History* may provide a critical perspective on current regimes. "Constraints" such as tradition, custom, and history turn out to be capable of challenging as well as conserving.

For contemporary liberals perhaps the archtypal constraint on governments is the concept of rights. For centuries human or natural rights have been a controversial concept – "a mine" – in the words of Burke – "that will blow up at one grand explosion all examples of antiquity, all precedents, charters, and acts of parliament."¹⁴ Much safer, Burke argued, is the concept of citizens' rights anchored in a nation's civic history – the same grounds for rights as suggested in Cicero's *Republic*. This conception of rights was more recently defended by Hannah Arendt. With the advent of human rights, she argues, the sort of specific, substantive claims that comprise citizens' rights (well illustrated by Scipio in the *Republic*) tend to be occluded by "the abstract nakedness of being human."¹⁵ With a nod to Burke, Arendt concludes that it is "much wiser" to "claim one's rights to be the 'rights of an Englishman' [or Frenchman or American or German] rather than the inalienable rights of man."¹⁶

Recently the concept of rights *per se* (regardless of grounding in history, nature, or the human subject) has been the subject of much criticism. Perhaps not surprisingly, Scruton gives them fairly short

¹³ For an attempt to tease out how Oakeshott might have responded, see Franco (1990) 137–8.

¹⁴ Burke, *Reflections on the Revolution in France*, 217. (This and subsequent references are to the page numbers of Clark's edition (2001) rather than to those of Burke's first edition, which are also provided in this volume.)

¹⁵ Arendt (1976) 299. ¹⁶ Arendt (1976) 299.

shrift in *The Uses of Pessimism*. He presumably classifies rights among the “conventional constraints” that he believes should govern human relations instead of “shared purposes.”¹⁷ Cicero, however, prompts us to entertain the possibility that rights and shared purposes are not mutually exclusive alternatives. The account in his *Republic* presents rights as civic bonds that allow citizens to engage one another in a shared enterprise. As we have seen, such rights limit what a government may do in pursuit of the good; still, a substantive notion of the good continues to receive priority in the dialogue. Those who worry about the inability of many versions of liberalism to provide a substantive vision of the good society, but are not yet willing to abandon rights talk completely, may find in Cicero a helpful interlocutor.

Given the resources of history and dangers of utopian planning, it might seem that utopia is of no value. So, for instance, Oakeshott issues the following challenge to those who find “hope without a utopian dimension”¹⁸ uninspiring, unambitious, and depressing:

But in the main the depression springs from the exclusion of hopes that were false and the discovery that guides, reputed to be of superhuman wisdom and skill, are, in fact, of a somewhat different character. If the doctrine deprives us of a model laid up in heaven to which we should approximate our behavior, at least it does not lead us into a morass where every choice is equally good or equally to be deplored. And if it suggests that politics are *nur für die Schwindelfreie* [only for those unafraid of heights], that should depress only those who have lost their nerve.¹⁹

Sen concurs. Political theorists should focus on “the comparison of societies that already existed or could feasibly emerge rather than confining their analyses to transcendental searches for a perfectly just society.”²⁰

In places Cicero gives such sentiments elegant expression. So for example, Laelius in the *Republic* approvingly points out that the conversation has turned away from the consideration of the utopian ideal regime of Plato’s *Republic* to an empirical analysis of a historically realized regime (*Rep.* 2.21–2). However, this realism does not lead Cicero to abandon considerations of the ideally rational and just society. Just the opposite: the *Republic* holds

¹⁷ Scruton (2010) 49. ¹⁸ Schofield (2006) 200.

¹⁹ Oakeshott (1962) 127. ²⁰ Sen (2009) 7.

out the heavens themselves as a model of perfect rationality; the *Laws* suggests that human laws are to approximate the perfectly rational law of nature. The gathering momentum of realism and an increasingly prevalent “utopophobia” – to borrow David Estlund’s term – has prompted some contemporary political philosophers to renew their efforts at identifying the benefits of ideal or utopian theories.²¹ It is therefore well worth taking time to draw out the reasons for the persistence of utopia in the *Republic* and *Laws*, dialogues whose theme is the limits of rational rule. What utility does utopia have for Cicero?

First, for Cicero the examination of utopia allows us to see more clearly human beings as they are by first seeing human beings as they hope to be. It is necessary for the political scientist to take into account the constraints of human nature on politics. This means he must accurately understand human nature. However, it is part of human nature to desire utopia, the “city one ought to pray for,” as Scipio once put it. Consequently, if one is to correctly understand human nature, one must also consider the species’ utopian impulse – the human desire for the perfectly good and just society. Interestingly, despite his general rejection of utopian thinking, Scruton in an important sense echoes Cicero’s insight that such thought is revealing of human nature. From one perspective, his book is a study in human nature, of which the desire for utopia is an important part. The examination of the utopian thought that human desires produce illuminates human nature more fully.

Cicero’s dialogues show yet another way in which utopia can help illuminate human nature. When utopian thought is projected and examined, it can serve as a mirror that magnifies the remaining non-utopian or non-rational strands of human nature. Thus, we observed that one of the functions of the cosmos in Scipio’s Dream was to illuminate the role that irrationality and contingency played in human political affairs precisely by showing a political order where these features were absent.

The constant presence of utopia throughout the *Republic* and *Laws* also safeguards against criticisms sometimes leveled against

²¹ See Chapter 14, “Utopophobia: Concession and aspiration in democratic theory,” in Estlund (2008) 258–75.

other concessive theories, namely, that they prematurely abandon ideals for smaller and easier goals.²² The persistence of ideals such as those represented by the utopian Dream of Scipio at the end of the *Republic* reinforces the reasons for earlier concessions, guides the statesman to his destination, and gives him hope for the journey. In this way, ideals in Cicero's dialogues aid the enquirer into politics much like mountaintops help hikers. The ability of a hiker occasionally to catch sight of a majestic but unclimbable peak in the distance reminds him of why he has decided to hike to a lower, more accessible destination, serves as a point of reference as he makes his way through the surrounding forest, and provides inspiration for the journey.

While Cicero precedes realists in cautioning against the attempted *implementation* of utopia, he suggests that it fulfills an important function as a model insofar as it provides a standard for a given political order. Why turn to a model of rationality – whether one finds it in the cosmos of the *Republic* or the natural law of the *Laws* – when tradition and history can serve this role? The answer cannot be that tradition is incapable of justifying itself, for the same would be true of reason, nature, or any other foundational principle. However, traditions vary and conflict in more readily apparent ways than either reason or nature. Hence, the city supported by tradition and history faces constant threat from those who would appeal to these seemingly more secure concepts. Cicero suggests what must be done to address Burke's concern of the constant threat of such arguments “burst[ing] like a Levanter, to sweep the earth with their hurricane, and to break up the fountains of the deep to overwhelm us.”²³ The friend of the city who would successfully ward off such attacks must find some way to connect the conventional and variable with that which is permanent and uniform.

However, Cicero also shows that nature and reason are perhaps not as uniform and unproblematic as one might suppose. Take the concept of nature. Cicero uses his various depictions of utopian rational rule to reveal that there may be fundamental

²² Estlund (2008) 270.

²³ Burke, *Reflections on the Revolution in France*, 217.

and important differences between nature and human nature. It is all too easy to stress that both these concepts should constrain human political practice without raising the possibility that they may conflict at certain points.²⁴ Let me take a moment to elaborate. One way to understand human beings is by examining the place that the species has in nature, that is, in relation to other species.²⁵ However, another way to understand human beings is to examine how they relate to one another, particularly how they relate as citizens who embrace certain habits derived from the particular circumstances of political life. These habits may, as Burke points out, produce a “second nature” different from the first.²⁶ How might one negotiate between nature in the first sense and human nature, which may be conditioned by those provisions that human beings commonly set aside for themselves in response to political need? What challenges attend this task? Cicero prompts us to consider this question, and it is still a good place to begin as we take stock of the advantages and limitations of using nature as a foundational concept.

Oakeshott was skeptical about political theories that rest upon nature or the cosmos;²⁷ Burke was less so.²⁸ For his part, Cicero suggests that the lawgiver should have recourse to these concepts, not because they are unproblematic or unassailably true, but because they are an indispensable part of a statesman’s armory, provided they are utilized with appropriate care.

It has been suggested that Oakeshott’s skepticism manifests itself in his preference for the essay over the treatise.²⁹ Cicero’s

²⁴ So Scruton (2010) 16 includes both “nature” and “human nature” as constraints without interrogating the possibility of conflict.

²⁵ Scruton (2010) 16.

²⁶ Burke, *Reflections on the Revolution in France*, 357.

²⁷ See e.g., Oakeshott’s essay “On being Conservative,” in Oakeshott (1962) 168–96.

²⁸ Consider, for example, the following passage in Burke’s *Reflections on the Revolution in France*: “By constitutional policy, working after the pattern of nature, we receive, we hold, we transmit our government and our privileges, in the same manner in which we enjoy and transmit our property and our lives. The institutions of policy, the goods of fortune, the gifts of Providence, are handed down, to us and from us, in the same course and order. Our political system is placed in a just correspondence and symmetry with the order of the world, and with the mode of existence decreed to a permanent body composed of transitory parts” (184). Whether such evidence warrants depicting Burke as a type of natural law thinker remains a matter of scholarly debate.

²⁹ Botwinick (2011) 15.

skepticism too appears in the literary form of his dialogues. The *Republic*, and to a lesser extent the more authoritarian *Laws*, makes its case more by prodding, prompting, and provoking the reader than by setting forth dogma to be readily and thoughtlessly assimilated. In this way, Cicero's argument in these dialogues takes on the type of exploratory feel characteristic of the Platonic dialogues on which they are modeled. And as in the case of Plato, so too for Cicero there may be a tension between form and content, between philosophical enquiry, which involves following one's own judgment rather than another's authority, and political rule, which requires the imposition and defense of authority.

Plato has also been a crucial source for Cicero's substantive philosophy. Cicero's familiarity with, and debt to, both Plato's *Republic* and *Laws* should now be evident. Of the two Platonic dialogues, it is the latter to which Cicero's project in these dialogues owes the greater debt. And like Cicero's *Republic* and *Laws*, Plato's own *Laws* has until recently languished in neglect, long overshadowed by his *Republic*. Hume notwithstanding, it is the bold and radical vision of the requirements of justice and the good that is more likely to maintain perpetually its hold on the human imagination. Perhaps this is all the more reason to return periodically to works that ask us to consider the extent to which such aspirations to justice might be realized.

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